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Execution by Quota?

Stanley Rothman & Stephen Powers

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BOOKS IN REVIEW

Jerry Z. Muller **on Stephen Holmes**
Karina Rollins **on Naomi Wolf**

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Execution by quota?

STANLEY ROTHMAN & STEPHEN POWERS

ON MARCH 17, 1994, the House Judiciary Committee voted to incorporate the Racial Justice Act into this year's Omnibus Crime Control Bill. The Act essentially would create quotas for the administration of the death penalty, under the assumption that the penalty is applied in a manner discriminatory to black Americans. While the legislation has been opposed by House Republicans, one should not, given the temper of the times and the mood of Congress, discount the possibility that it eventually will become law.

The Racial Justice Act would prohibit "the imposition or execution of the death penalty in a racially discriminatory pattern." Further, the Act provides that to establish a prima facie showing of discrimination:

> it shall suffice that death sentences are being imposed or executed ... upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death-eligible crimes....

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The controversy

The employment of the death penalty as the ultimate criminal sanction has been the subject of enormous debate. Execution has been challenged not only on moral and religious grounds, but more recently on constitutional grounds—as a violation of the Eighth Amendment's protection against cruel and unusual punishment. Opponents of the death penalty contend that it is employed so arbitrarily as to amount to a game of state-sponsored Russian roulette. While the Supreme Court has not ruled capital punishment to be unconstitutional, in 1972 it held that the death penalty was unconstitutional as then practiced, finding evidence of arbitrariness sufficient to require that states overhaul death sentencing procedures.

One of the most controversial aspects of the arbitrariness claim is the charge—leveled by numerous activists and social scientists—that the death penalty has been applied in a manner unfair to blacks. In *Furman vs. Georgia* (1972), several members of the Court observed that racial discrimination had produced different patterns of sentencing and rates of execution for blacks and whites. Indeed, numerous studies of the late 1800s and early 1900s have found that blacks were executed in disproportionate numbers, particularly when the victims of their crimes were white.

The apparently discriminatory impact of capital punishment has not gone unnoticed in Congress. In fact, one aim of the Racial Justice Act is to circumvent prior federal court decisions which have held that statistical research does not provide sufficient evidence of "discriminatory intent" to trigger Fourteenth Amendment protection. The Act states that "it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution."

If the Racial Justice Act becomes law, state and federal authorities will have to demonstrate that any racial disparities in sentencing are "clearly and convincingly" explained by non-racial factors. Given the high cost of litigation and likely delays, as well as the difficulty of proving non-discrimination when sentencing is based partly on factors not easily subjected to statistical analysis (how does one quantify the "heinousness" of a crime?), states could be forced to abandon death sentences against some black defendants, irrespective of the merits of the cases. If this occurred, sooner or later it might also be an easy matter for

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white defendants to show discriminatory sentencing under the same law. The death penalty would be effectively eliminated.

But is death sentencing truly discriminatory? The truth is complicated by a number of factors that opponents of the death penalty have tended to discount or ignore. There appear to be legitimate reasons for racially disparate sentencing. Indeed, a number of social scientists have argued that racial prejudice is not a significant determinant of execution rates. These social scientists have demonstrated that when a number of legal factors are taken into account, the relationship between a defendant's race and the likelihood of execution tends to disappear. Why, we must ask, in spite of the questionable validity of the discrimination thesis, does the death penalty continue to be assailed as one of the most repugnant manifestations of American racism?

Past studies

Before the Supreme Court's decision in *Furman*, a majority of death penalty studies had reported that discrimination against black defendants was substantial, particularly in cases of rape and in the South. Certainly there was ample historical precedent. By law, black slaves were subject to the death penalty for numerous crimes for which whites received much more lenient sentences. In 1848, for example, Virginia enacted a statute which required that blacks be executed for any crime for which whites might receive three years' imprisonment (Dike, 1981). The evidence for discriminatory death sentencing through the nineteenth and early twentieth centuries, particularly in the South, seems incontrovertible.

Even when discriminatory sentencing was not actually prescribed by law, statistical studies show that before the 1950s black offenders were much more likely than whites to be executed for murder. In 1930, H.C. Brearley reported that in South Carolina, from 1920 to 1926, blacks accused of murder were twice as likely as whites to be convicted. And during the period from 1915 to 1927, blacks were more than three times as likely as whites to be executed. Numerous researchers reported similar findings from the 1930s through the late 1960s.

Nevertheless, by the mid-1970s studies were uncovering methodological problems with some of the earlier research. In 1974, John Hagan reanalyzed a number of studies involving capital

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sentencing and found that most of the studies had confused correlation and causation. When Hagan controlled for prior record and type of offense, he found that the influence of race dropped dramatically. He concluded that:

> knowing the race of the offender ... increases the accuracy of predicting judicial disposition by 1.5 percent. The causal importance of even this minimum relationship, however, is called into doubt by the single study controlling simultaneously for charge, and related "third" variables.

In a similar vein, a 1981 study by Gary Kleck found that between 1929 and 1966 the rate of execution for blacks (9.7 per 1,000 murders) was slightly lower than that for whites (10.4 per 1,000 murders). Indeed, Kleck made another important observation: "in the recent past, outside of the South, white execution risk has been substantially higher than the nonwhite risk, a fact which apparently has gone unnoticed in the literature."

In the past, Kleck suggested, black criminals may have been treated relatively leniently because their crimes against other blacks were not taken seriously, or perhaps because of white paternalism (blacks frequently were viewed as less culpable for their actions). In more recent times, Kleck suggested, the relatively lenient treatment of blacks may be due to the attempts of judges to compensate for what they perceive as institutional racism, or to make up for their own unconscious racism. Kleck also noted that his own figures do not take into account prior sentencing records and that, since in other studies this factor has tended to suppress racial disparities, his own findings probably understate the higher execution risk for whites. Overall, although Kleck found evidence of discrimination in certain historical periods (especially in the South), and for particular classes of crime such as rape, he found no evidence of system-wide discrimination in the imposition of the death penalty beyond the 1950s.

Since the publication of Kleck's study, many other studies have appeared that also find white defendants to be at greater risk in murder cases than black defendants, even in the South, though one or two of the studies have attempted to explain the findings away in a manner described below (Baldus et. al., 1990; Ekland-Olsen, 1988; Gross, 1985; Katz, 1989; Nakel and Hardy, 1987; Pesternoster, 1984; and Radelet, 1981).

With some research indicating that discriminatory sentencing

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of black offenders was confined to the South and probably had ended by the 1950s, sociologists began to search for more subtle evidence of discrimination.[1] As far back as the 1930s, a handful of studies had reported that blacks who killed whites were more likely to receive the death penalty than blacks who killed other blacks, or than whites who killed members of either race. One of the first of these studies hypothesized that, as a subjugated race, blacks were "treated with undue severity" (Johnson, 1941). The author of the study found that in a sample drawn from parts of three southern states, black offenders were significantly more likely to be executed when their victims were white than black. Only 64 percent of blacks sentenced to death for killing other blacks were executed, whereas 81 percent of blacks who killed whites were put to death.

The researcher argued that blacks who killed other blacks were treated leniently because they were viewed by authorities as childish and not fully culpable for their actions. Yet when blacks killed members of the dominant racial caste, they were punished especially severely, to keep them in their place. Without considering the influence of factors other than race, the author concluded that the data "point toward a partial confirmation of our hypothesis." This failure to consider alternative explanations is characteristic of the research prior to the 1960s.

However, some later and better-constructed studies have reached similar conclusions. One study, published in 1983, found that the offender-victim racial combination was at least as significant a predictive factor in death sentencing as any other legal variable (e.g., contemporaneous felony, multiple victims).

A number of studies have attributed this seeming racism to prosecutorial discretion. A recent study in Kentucky, for example, suggested that prosecutors tend to view cases in which blacks kill whites as more serious than other types of cases. The researchers were cautious in attempting to explain why this might be, and pointed out that factors beyond the scope of their analysis might have been influential. Nevertheless, their study clearly implies that race continues to be a significant and obviously illegitimate factor in death sentencing (Keil and Vito, 1991).

Still other studies have found that social class is an important

[1]This does not mean that the old arguments have disappeared. Rep. John Conyers, for example, still argues that blacks are more likely than whites to be executed for the same crime, without any of the media examining his claims.

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factor. A few notable studies have shown that once one controls for the offender's social class, race becomes an insignificant predictor. For example, a 1969 study by Charles Judson and others found that race was not a statistically significant determinant of death sentencing. If anything, Judson's statistics suggest that whites were more likely to receive death sentences than blacks (48 percent of whites received death sentences, and 40 percent of blacks). But when Judson and his colleagues controlled for various crime-related variables, the influence of race disappeared. The socio-economic status of the offender, however, did seem to be important. Of course the substitution of one extra-legal variable for another does not justify differential sentencing, but it does suggest that our knowledge of the factors involved in sentencing is very limited. Indeed, the number of variables that can be shown to influence sentencing seems sometimes to be limited only by the ingenuity of the researchers involved.

A 1983 report of the Panel on Sentencing Research, commissioned by the prestigious National Research Council (NRC), concluded that even among the more sophisticated studies which found discrimination in cases with black offenders and white victims, race was a relatively weak predictive variable. The NRC panel cautioned that the "validity of statistical inferences about the determinants of sentences depends crucially on the methodological rigor with which the effects were estimated.... [and] the findings presented here are weighed in light of potentially serious methodological flaws in research" (Blumstein et al., 1983).

Other critics point out that key legal variables, such as prior record and seriousness of offense, have been difficult for researchers to document and even more difficult to quantify. Other legally relevant factors, such as degree of criminal intent, frequently have been overlooked. The fundamental problem with studies of the relationship between race and the death penalty is that they fail to establish convincing causal explanations. In fact, most studies demonstrate that numerous variables influence capital sentencing. For all we know, many other influential variables may be as yet untested. Some may be unquantifiable. On the basis of the available research, one simply cannot conclude that racial discrepancies are a function of racism.

Reviewing the history of research on race and sentencing generally, William Wilbanks found at least seven different "mod-

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els of method and interpretation" in the literature (Wilbanks, 1987). Despite the wide variation, he contends that some general observations on race and sentencing are possible. Among them, he includes the following:

> Racial discrimination in sentencing has declined over time.... The black/white variation in sentences is generally reduced to near zero when several legal variables are introduced as controls.... The race effect, even before controls, is not substantially significant, in that the predictive power of race is quite low.... Most sentencing studies have a large residual variation, suggesting that the models used did not fit the actual decision making of judges....

These observations have proved to be especially applicable to research on discrimination and the death penalty.

Who kills whom and why

The vast majority of murderers who receive the death penalty are involved in intra-racial offenses—that is, in cases of whites killing whites or blacks killing blacks. Most analysts agree that between 92 and 97 percent of homicides are intra-racial. In the much smaller number of cases in which blacks kill whites, the circumstances surrounding the crimes appear to be substantially different. (The number of cases in which whites kill blacks is usually too small to be factored into analyses.)

Black on black homicides are most likely to occur during altercations between persons who know one other. On the other hand, black on white homicides (and to a somewhat lesser extent, white on white) are often committed during the course of a felony or by a multiple offender. In fact, these are examples of aggravating conditions that the Supreme Court has held to be valid criteria in determining sentence severity. Yet while judges and juries take these factors into account, sociological studies often do not. Lest one think the motivation of judges and juries is racism, these factors are given consideration in societies all over the world, whatever their racial composition. They are seen universally as both fair and conducive to public order.

The key issue, then, is whether blacks convicted of killing whites are more likely to be executed because of the racial identity of their victims or because of qualitative differences in the nature of their crimes. In fact, the latter is clearly the case

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and would appear to explain much of the racial disparity in death sentencing.

The McCleskey case

One of the most effective challenges to the claim of racial discrimination actually arose in a court case that supporters of the discrimination thesis had hoped would prove their point. In the 1980s, the National Association for the Advancement of Colored People (NAACP) funded a major study of the effect of race on criminal sentencing. The study, directed by university professors David Baldus, Charles Pulaski, and C. George Woodworth, gained notoriety when it was used in the defense of Warren McCleskey, a black man sentenced to death for the shooting of a white police officer in Georgia. Defense attorneys relied on the Baldus study to substantiate their claim of systemic discrimination against black defendants. The study showed that in cases of mid-range aggravation, blacks who killed whites were more likely to receive the death penalty than whites who killed whites. (In cases of low and high aggravation, the study found race to be an insignificant factor.) The authors of the study argued that racial bias occurred because prosecutors and juries were prejudiced.

The attorneys prosecuting McCleskey countered by hiring an expert methodologist, Joseph Katz, who analyzed the NAACP study and found a number of conceptual and methodological problems. For one, it turned out that police reports often did not include some of the case circumstances that were supposed to have been weighted in the study. In these instances, the researchers recorded that the circumstances were not present, when, in fact, that was not possible to determine. Katz also pointed out that the researchers frequently weighted aggravating conditions in subjective ways. Most importantly, he argued that the researchers had not accounted satisfactorily for the fact that black offender-white victim homicides were often quite different from intra-racial homicides. Katz showed that black on white murders tended to be the most aggravated of all, and frequently were combined with armed robbery, as McCleskey's was. Katz also testified that by Baldus's own measures, McCleskey's was not a mid-range case but a highly aggravated one, and that in such cases the death penalty was as likely to be applied to whites as blacks.

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The Supreme Court ended up rejecting the McCleskey defense, and ruled that statistical models alone do not provide sufficient evidence of discrimination. Later, Katz testified before the Senate Judiciary Committee, and offered further evidence of the differences between homicides in which blacks kill blacks and blacks kill whites. Katz reported that the reason why 11 percent of blacks who killed whites in Georgia received the death penalty—as opposed to only 1 percent of blacks who killed blacks—was that the killings of whites more often involved armed robbery (67 percent of the black on white cases, compared with only 7 percent of the black on black cases). In addition, black on white murders more frequently involved kidnapping and rape, mutilations, execution-style murders, tortures, and beatings. These are all aggravating circumstances that increase the likelihood of a death sentence.

By contrast, 73 percent of the black victim homicides were precipitated by a dispute or fight, circumstances viewed by the courts as mitigating. Katz also observed that 95 percent of black victim homicides were committed by black offenders, and that there were so few white on black cases that no distinctive homicide pattern could even be ascertained. Among the fewer than thirty Georgia cases identified by Katz as white on black, mitigating circumstances seemed to outweigh aggravating. These crimes rarely involved a contemporaneous felony and often were precipitated by a fight. This pattern may or may not hold outside of Georgia, but to date there has been no detailed national study of white on black crime. (Research has also shown that death sentences are especially likely in cases in which police officers are killed in the line of duty, and that 85 percent of police officers killed are white.)

As pointed out earlier, some findings suggest that blacks may actually be treated more leniently than whites. Analysts at the Bureau of Justice Statistics have pointed out that the percentage of inmates on death row who are black (42 percent) is lower than the percentage of criminals charged with murder or nonnegligent manslaughter who are black (48 percent). If the legal system still discriminates against blacks, why do they make up a higher percentage of those charged with murder than those executed for murder?

Some critics reply that the police may be more likely to arrest and charge blacks than whites. Yet we have found few data that

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support this assertion. In fact, Patrick Langan, a senior statistician at the Bureau of Justice Statistics, investigated the possibility of such discrimination and found little evidence of it. Langan based his research on victims' reports of the race of offenders, and found that blacks were sentenced at rates similar to those one would expect given the reports of victims (Langan, 1985). Obviously, this kind of research could not be conducted for murder cases (because the victims are dead) but the research suggests that the discriminatory arrest argument is highly problematic.

In the federal courts, the discrimination argument has found little support. In a number of cases, judges have concluded that the evidence of systemic bias is extremely weak. Rather than order an overhaul of the legal system on the basis of highly problematic and conflicting social science research, judges have preferred to adjudicate discriminatory sentencing claims on a case by case basis. The preferred corrective has been procedural reforms. A number of states have adopted clearer sentencing standards, various provisions to remove extra-legal influences, and the judicial review of death sentences.

Ideology prevails

Why, then, have some researchers continued to find evidence of racial discrimination? One possible explanation is that while the sociologists who design death penalty studies are most interested in and competent to measure such variables as the demographic characteristics of groups, these sociologists are ill-equipped to assess the importance of the legal variables that influence the operation of the criminal justice system. In the past, researchers did not bother to control for even the most obvious of legal variables.

Yet despite the crudeness of their methods, sociologists have concluded confidently that racism in the legal system is rampant. Mindful of the history of racial discrimination in capital cases, sociologists perhaps are predisposed to conclude that discrimination persists today. It seems obvious.

An additional difficulty with many of the sociologists is that their assumptions concerning discrimination are often overly idealistic—for example, the belief that extra-legal variables must be entirely absent from the criminal justice system for it to be

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legitimate, and the assumption that complete objectivity is even possible. Taken to their logical extremes, these kinds of utopian beliefs would require us to condemn virtually every legal system in the history of the world. At best, legal systems are imperfect institutions, reflecting community standards of fairness and objectivity. The jury system and judicial discretion are indispensable instruments of social justice, which permit broad principles to be tailored to the particulars of each case. Without these instruments, and the attendant margin of error or abuse that all free exercises of judgment hazard, the legal system would be doomed either to excessive punishments or to a forbearance that placed innocent individuals at great risk.

While there is justification for the claim that discriminatory capital sentencing and execution occurred in the past, the charge that they persist today lacks support. The best available evidence indicates that disproportionate numbers of blacks commit murder, and that in those cases in which the victims are white the crimes generally are aggravated. That is why blacks are overrepresented on death row.

Politics and the death penalty

Clearly there are reasons other than statistical analysis for the continued belief that the legal system discriminates against black defendants. Those who oppose the death penalty on principle, for example, tend to incorporate the discrimination argument into their litany of protest. These critics perceive capital punishment as a vestige of an outmoded, barbaric, and irrational penal code. Black elites, meanwhile, often perceive discrimination in places others do not. They are joined by members of the white cultural establishment, who are quick to sympathize with those who allege racial unfairness.

This may sound like a harsh indictment, but how else are we to explain the facts? For decades, those who argued that the death penalty was administered in a biased manner maintained that the fact that more blacks were executed than whites revealed a lack of concern for black lives. When this argument became untenable—when it became clear that white murderers were actually more likely to be executed than black murderers—these same critics turned to other, equally unsatisfactory arguments. Now, however, they reject the implication of their previ-

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ous view—that the execution of a larger percentage of whites than blacks must reveal a lack of concern for white lives. The only issue now is the race of the criminal's victim. These critics rationalize their position, but, we submit, their stance can be explained only by a need to find racism everywhere. One is reminded of the wolf in Aesop's fable. The wolf insisted that the lamb was injuring him, and was quick to change his story each time the lamb pointed out the factual errors in his claims. Finally, the wolf killed and ate the lamb anyway, proving that desire can overcome the failure of rationalization.

And so

If the controversy over racial discrimination and the death penalty turned on the merits of the research, politicians would have to concede that death penalty discrimination has been virtually eliminated. Alas, the news media have done little to clarify matters. Most reporting on the issue is inaccurate. An article that appeared in the *New York Times* on April 21, 1994, is typical. The article concluded as follows:

> That some bias occurs is not much at issue. Many studies show that juries mete out the death penalty to black and other minority defendants in a disproportionate number of murder cases, particularly when the victims are white and especially in states and counties that have a history of racial problems.

In fact, as we have shown, these comments are patently false.

Of course, many key questions remain. Is the death penalty arbitrary, given that only a fraction of those eligible are ever executed? Is it barbaric? Is it ineffective as a deterrent? If the answers to these questions are affirmative, two remedies are available: the death penalty can be abolished or subjected to further reform. But whatever society decides, such a decision should not be based on unsubstantiated charges of racial discrimination.

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Should immigrants assimilate?

ALEJANDRO PORTES AND MIN ZHOU

MY NAME IS HERB / and I'm not poor / I'm the Herbie that you're looking for / like Pepsi / a new generation / of Haitian determination / I'm the Herbie that you're looking for."

A beat tapped with bare hands, a few dance steps, and the Haitian kid was rapping. His song, entitled "Straight Out of Haiti," was performed at Edison High, a school that sits astride Little Haiti and Liberty City—the largest black area of Miami. The lyrics capture well the distinct outlook of his immigrant community. In Little Haiti, the storefronts leap out at the passersby. Bright blues, reds, and oranges vibrate to Haitian *merengue*, blaring from sidewalk speakers. Yet behind the gay Caribbean exterior, a struggle goes on that will define the future of this community. As we will see, it involves the second generation—children like Herbie—who are subject to conflicting pressure from parents and peers, and to pervasive outside discrimination.

Growing up in an immigrant family has always been difficult. Individuals are torn by conflicting social and cultural demands, while facing the challenge of entry into an unfamiliar and frequently hostile world. Yet the difficulties are not always the same. The process of "growing up American" ranges from smooth acceptance to traumatic confrontation, depending on the charac-

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teristics that immigrants and their children bring along and the social context that receives them. We believe that something quite disturbing is happening to the assimilation or, if you will, the "Americanization" of the second generation of new immigrants.

Research on the new immigration—that which arose after passage of the 1965 Immigration Act—has focused almost exclusively on the first generation, which is composed of adult men and women who came to the U.S. in search of work or to escape political persecution. Little noticed until recently is the growth of the second generation. Yet by 1980, second-generation immigrants made up 10 percent of the children counted by the U.S. Census. Another survey in the late 1980s found that 3 to 5 million American students speak a language other than English at home.

While there has been a great deal of research and theorizing on post-1965 immigration, it offers only tentative guidance on the prospects and paths of adaptation of the second generation, whose outlook may be very different from that of the first. For example, it is generally accepted among immigration experts that entry-level menial jobs are performed without hesitation by newly arrived immigrants, but that these same jobs are shunned by the immigrants' U.S.-reared offspring. The social and economic progress of first-generation immigrants often fails to keep pace with the material conditions and career prospects that their American children grow to expect.

What literature on second-generation adaptation that exists is based largely on the experience of the descendants of pre-World War I immigrants. The last sociological study of the children of immigrants seems to have been Irving Child's *Italian or American? The Second Generation in Conflict*, published fifty years ago. Conditions at the time were quite different from those that confront settled immigrant groups today. Two such differences deserve special mention. First, the descendants of European immigrants who confronted the dilemmas of conflicting cultures were uniformly white. Even if they were of a somewhat darker hue than the natives, their skin color permitted them to skirt a major barrier to entry into the American mainstream. As a result, the process of assimilation depended largely on the individual's decision to leave the immigrant culture behind and

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to embrace American ways. This advantage obviously does not exist for the black, Asian, and mestizo children of today's immigrants.

Approximately 77 percent of post-1960 immigrants are non-European: 22 percent are Asian, 8 percent are black, and 47 percent are Hispanic. (The latter group, which originates in Mexico and other Latin American countries, poses a problem in terms of classification since Hispanics can be of any race.)

The immigrants of recent years also face economic opportunities different than those in the past. Fifty years ago, the United States was the premier industrial power in the world. Its diversified industrial labor requirements offered the second generation the opportunity to move up gradually through better-paid occupations while remaining part of the working class. Such opportunities have grown scarce in recent years as the result of rapid national de-industrialization and global restructuring. This process has left entrants to the American labor force confronting a growing gap between the minimally paid menial jobs commonly accepted by immigrants and the high-tech and professional jobs generally occupied by college-educated native elites. This disappearance of intermediate opportunities has contributed to the mismatch between first-generation economic progress and second-generation expectations.

Assimilation as a problem

We see these processes occurring under particularly difficult circumstances among the Haitians of Miami. The city's Haitian community is composed of some 75,000 legal and clandestine immigrants, many of whom sold everything in order to buy passage to America. Haitians of the first generation are strongly disposed to preserve a robust national identity, which they associate both with community solidarity and with social networks promoting individual success. But in trying to instill in their children national pride and an orientation toward achievement, they often clash with the youngsters' everyday experiences in school. Little Haiti is adjacent to Liberty City, the main black inner-city area of Miami, and Haitian adolescents attend predominantly inner-city schools. Native-born black youth stereotype the Haitian youngsters as docile and subservient to whites, and make fun of the Haitians' French and Creole as well as

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their accents. As a result, second-generation Haitian children find themselves torn between conflicting ideas and values: to remain "Haitian," they must endure ostracism and continuing attacks in school; to become "American" (black American in this case), they must forgo their parents' dreams of making it in America through the preservation of ethnic solidarity and traditional values.

An adversarial stance toward the white mainstream is common among inner-city minority youth, who instill in the newcomers consciousness of American-style discrimination. Also instilled is skepticism about the value of education as a vehicle for advancement, a message that directly contradicts that from immigrant parents. Academically outstanding Haitian-American students, Herbie among them, have consciously attempted to retain their ethnic identity by cloaking it in black American cultural forms, such as rap music. Many others, however, have followed the path of least resistance and thoroughly assimilated. In such instances the assimilation is not to mainstream culture, but to the values and norms of the inner city. In the process, the resources of solidarity and mutual support within the immigrant community are dissipated.

As the Haitian example illustrates, adopting the outlook and cultural ways of the native born does not necessarily represent the first step toward social and economic mobility. It may, in fact, lead to exactly the opposite. Meanwhile, immigrant youth who remain firmly ensconced in their ethnic communities may, by virtue of this fact, have a better chance for educational and economic mobility.

This situation stands the common understanding of immigrant assimilation on its head. As presented in innumerable academic and journalistic writings, the expectation is that the foreign born and their offspring will acculturate and seek acceptance among the native born as a prerequisite for social advancement. If they did not, they would remain confined to the ranks of the "ethnic" lower and lower-middle classes. This portrayal of the path to mobility, so deeply embedded in the national consciousness, stands contradicted today by a growing number of empirical studies.

A closer look at these studies, however, indicates that the expected consequences of assimilation have not changed entirely, but that the process has become segmented. In other words, the

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question is to what sector of American society a particular immigrant group assimilates. In the absence of a relatively uniform "mainstream" whose mores and prejudices dictate a common path of integration, we observe today several distinct forms of adaptation. One of them replicates the time-honored portrayal of growing acculturation and parallel integration into the white middle-class; a second leads straight in the opposite direction to permanent poverty and assimilation to the underclass; still a third combines rapid economic advancement with deliberate preservation of the immigrant community's values and solidarity. This pattern of "segmented assimilation" immediately raises the question of what makes some immigrant groups susceptible to the downward route and what resources allow others to avoid this course. In fact, the same general process helps to explain both outcomes. We will advance next our understanding of how this process takes place and how the differing outcomes of the assimilation process can be explained. In the final section, this explanation will be illustrated with recent empirical evidence.

Vulnerability and resources

While individual and family variables are influential, the context that immigrants encounter upon arrival plays a decisive role in the course that their offspring's lives will follow. This context includes such broad variables as political relations between the sending and receiving countries and the state of the economy in the latter, and such specific variables as the degree to which the immigrant group meets discrimination and finds a pre-existing ethnic community. Thus, Cuban immigrants of the 1960s came under perhaps the best circumstances: they were welcomed by the government, did not meet great prejudice, and soon formed a supportive community. On all three dimensions, the contrast with the Haitians is great.

To explain second-generation outcomes and their "segmented" character, however, we need to consider in greater detail the various paths of assimilation. There are three features of the social contexts encountered by today's newcomers that create vulnerability to downward assimilation: the first is color, the second is location, and the third is the absence of mobility ladders. As noted above, the majority of contemporary immigrants are non-white. Although this feature may at first glance

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appear to be an individual characteristic, in reality it is a trait of the host society. Prejudice is not invariably suffered by those with a particular skin color or racial type, and indeed many immigrants never experienced prejudice in their native lands. It is by virtue of moving into a new social environment, marked by different values and biases, that physical features become redefined as a handicap.

The concentration of immigrant households in cities and, in particular, central cities, gives rise to a second source of vulnerability because it puts new arrivals in close contact with concentrations of native-born minorities. This leads the majority to identify both groups—immigrants and the native poor—as identical. Even more importantly, it exposes the children of immigrants to the adversarial subculture that marginalized native youth have developed to cope with their own difficult situation. This process of socialization may take place even when first-generation parents are moving ahead economically and, hence, when their children have no "objective" reasons for embracing a countercultural message. If successful, this socialization can effectively block parental plans for inter-generational mobility.

The third source of vulnerability results from changes in the economy that have led to the elimination of occupational ladders for inter-generational mobility. New immigrants form the backbone of what remains of labor-intensive manufacturing in the cities, as well as of the growing personal services sector, but these are niches that seldom offer channels for upward mobility. The new "hourglass economy" created by economic restructuring means that the children of immigrants must cross a narrow bottleneck to occupations requiring advanced training if their careers are to keep pace with their U.S.-acquired aspirations. This "race" against a narrowing middle demands that immigrant parents accumulate sufficient resources to allow their children to cross the bottleneck (and, simultaneously, to believe that they can cross the bottleneck). Otherwise, "assimilation" may be not to mainstream values and expectations, but to the adversarial stance of impoverished groups confined to the bottom of the hourglass.

We have painted the picture in such stark terms for the sake of clarity, although in reality things have not yet become so polarized. Middle-level occupations that require relatively modest educational achievement have not vanished completely. As of

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1980, skilled blue-collar jobs (classified by the U.S. Census as "precision production, craft, and repair occupations") had declined by 1.1 percentage points compared to a decade earlier, but still represented 13 percent of the experienced civilian labor force, or 13.6 million workers. Administrative support occupations, mostly clerical, added another 16.9 percent of the jobs. Meanwhile, occupations requiring a college degree increased by 6 percentage points from 1970 to 1980, but still employed less than a fifth of the American labor force (18.2 percent). Even in the largest cities, occupations requiring only a high school diploma were common in the late 1980s. In New York City, for example, persons with twelve years or less of schooling held just over half of the jobs in 1987. Yet despite these figures, there is little doubt that the trend toward occupational segmentation has reduced opportunities for upward mobility through well-paid, blue-collar positions. This trend forces today's immigrants to bridge in one generation the gap between entry-level and professional positions, a distance that earlier groups took two or three generations to travel.

At the same time, there are three types of resources that ease the assimilation of contemporary immigrants. First, certain groups, notably political refugees, are eligible for a variety of government programs including educational loans for their children. The Cuban Loan Program, begun by the Kennedy administration as part of a plan to resettle Cuban refugees beyond south Florida, gave many impoverished first- and second-generation Cuban youth a chance to attend college. The high proportion of professionals and executives among Cuban-American workers today, a figure on par with that for native white workers, can be traced, at least in part, to the success of that program. Passage of the 1980 Refugee Act gave subsequent refugees, in particular Southeast Asians and Eastern Europeans, access to a similarly generous benefits package.

In addition, certain foreign groups have managed to escape the prejudice traditionally endured by immigrants. This has facilitated a smoother process of adaptation. Political refugees such as the early waves of exiles from Castro's Cuba, Hungarians and Czechs escaping the invasions of their respective countries, and Soviet Jews escaping religious persecution, provide examples. In other cases, it is the cultural and phenotypical affinity of new-

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comers to ample segments of the host population that ensures a welcome reception. The Irish who came to Boston during the 1980s provide a case in point. Although many were illegal aliens, they came into an environment where generations of Irish-Americans had established a secure foothold. Public sympathy effectively neutralized governmental hostility in this case, and led to a change in the immigration law that directly benefited the newcomers.

Third and most important are the resources made available through networks in the co-ethnic community. Immigrants who join well-established and diversified ethnic groups have access to a range of moral and material resources well beyond those available through official assistance programs. Educational help for second-generation youth may include not only access to college grants and loans, but a private school system geared to immigrant community values. Attendance at these private ethnic schools insulates children from contact with native minority youth, while reinforcing the authority of parental views and plans.

In addition, the economic diversification of some immigrant communities creates niches of opportunity that members of the second generation can occupy, often without need for an advanced education. Small-business apprenticeships, access to skilled building trades, and well-paid jobs in local government bureaucracies are some of the many ethnic niches documented in the recent literature. In 1987, average sales per firm of the smaller Chinese, East Indian, Korean, and Cuban enterprises exceeded $100,000 per year, and jointly they employed more than 200,000 workers. These figures omit medium-sized and large ethnic corporations whose sales and work forces are much greater. Fieldwork in these communities indicates that up to half of recently arrived immigrants are employed by co-ethnic firms and that self-employment offers a prime avenue of mobility for second-generation youth. Through the creation of a capitalism of their own, some immigrant groups have thus been able to circumvent outside discrimination and the threat of vanishing mobility ladders.

In contrast to these favorable conditions are those faced by foreign minorities who lack a community already in place or co-ethnics capable of rendering assistance. The Haitians in south Florida, cited above, must cope with official hostility and wide-

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spread social prejudice, as well as the absence of a strong receiving community. Yet in some cases the existence of a large but downtrodden co-ethnic community may be even less desirable than no community at all. That is because newly arrived youth enter into ready contact with the reactive subculture developed by earlier generations. Its influence is all the more powerful because it comes from individuals of the same national origin, "people like us" who can effectively define the proper stance and attitudes of the newcomers. To the extent this occurs, the first generation's aspirations of upward mobility through school achievement and attainment of professional occupations will be blocked.

The case of Mexican-Americans

"Field High School" is located in a small community in central California whose economy has long been tied to agricultural production and immigrant farm labor. About 57 percent of Field's students are of Mexican descent. An intensive study of the class of 1985 by M.G. Matute-Bianchi revealed that the majority of U.S.-born Spanish-surname students dropped out by their senior year. Yet of the Spanish-surname students originally classified by the school as Limited English Proficient (LEP), only 35 percent dropped out. (LEP status is commonly assigned to recently arrived Mexican immigrants.) This drop out rate was even lower than the 40 percent rate for native white students.

Intensive ethnographic fieldwork at the school identified several distinct categories into which the Mexican-origin population could be grouped. "Recent Mexican immigrants" were at one extreme. They dressed differently and unstylishly. They claimed a Mexican identity and considered Mexico their permanent home. The most academically successful of this group were those most proficient in Spanish, reflecting their prior levels of education in Mexico. Almost all were described by teachers and staff as courteous, respectful, serious about their schoolwork, and eager to please, as well as naïve and unsophisticated. They were commonly classified as LEP.

"Mexican-oriented students" spoke Spanish at home but were generally classified as Fluent English Proficient (FEP). They had strong cultural ties with both Mexico and the U.S., reflecting the fact that most were born in Mexico but had lived in the U.S. for

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more than five years. They were proud of their Mexican heritage, but saw themselves as different from the first group, the *recién llegados* (recently arrived) as well as from the native-born Chicanos and Cholos who were derided as having lost their Mexican roots. Students from this group were active in soccer and the *Sociedad Bilingue* and in celebrations of May 5th, the anniversary of the Mexican defeat of French occupying forces. Virtually all the students of Mexican-descent who graduated in the top 10 percent of their class were members of this group.

"Chicanos" were by far the largest group of Mexican descent at Field High. They were mostly U.S.-born second- and third-generation students whose primary loyalty was to their in-group, seen as locked in conflict with white society. Chicanos derided successful Mexican students as "schoolboys" and "schoolgirls" or as "wannabes." According to Matute-Bianchi:

> To be a Chicano meant in practice to hang out by the science wing ... *not* eating lunch in the quad where all the "gringos" and "schoolboys" hang out ... cutting classes by faking a call slip so you can be with your friends at the 7-11 ... sitting in the back of classes and not participating ... *not* carrying your books to class ... *not* taking the difficult classes ... doing the minimum to get by.

Chicanos merged imperceptibly into the last category, the "Cholos," who were commonly seen as "low riders" and gang members. They were also U.S.-born Mexican-Americans, easily identifiable by their deliberate manner of dress, walk, and speech, and other cultural symbols. Chicanos and Cholos were generally regarded by teachers as "irresponsible," "disrespectful," "mistrusting," "sullen," "apathetic," and "less motivated," and their poor school performance was attributed to these traits. According to Matute-Bianchi, Chicanos and Cholos were faced with what they saw as a choice between doing well in school and being Chicano. To study hard was to "act white" and so be disloyal to one's group.

The situation of these last two groups exemplifies a lost race between first-generation achievements and later generation expectations. Seeing their parents and grandparents confined to menial jobs, and increasingly aware of discrimination by the white mainstream, the U.S.-born children of earlier Mexican immigrants readily join a reactive subculture as a means of protecting their sense of self-worth. Participation in this subculture erects

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serious barriers to upward mobility because school achievement is defined as antithetical to ethnic solidarity. Like the Haitian students in Miami, newly arrived Mexicans are at risk of being socialized into a reactive stance, with the aggravating factor that it is "other Mexicans," not native-born strangers, who convey the message. The principal protection of *mexicanos* against this type of assimilation lies in their strong identification with the home country's language and values, which brings them closer to their parents' cultural stance.

The case of Punjabi Sikhs

"Valleyside" is a northern California community in which the primary economic activity is orchard farming. Farm laborers in the area often come from India and are mainly rural Sikhs from the Punjab. In the early 1980s, second-generation Punjabis made up 11 percent of the student body at Valleyside High. Their parents were not only farm laborers; about a third were orchard owners themselves and another third worked in factories in the nearby San Francisco area. An ethnographic study of Valleyside High between 1980 and 1982 by M.A. Gibson revealed a very difficult process of assimilation for Punjabi Sikh students. According to Gibson, Valleyside is "redneck country" and white residents are extremely hostile toward immigrants who look different and speak another language:

> Punjabi teenagers are told they stink ... told to go back to India ... physically abused by majority students who spit at them, refuse to sit by them in class or in buses, throw food at them or worse.

Despite these attacks and some evidence of discrimination by school staff, Punjabi students performed better than the majority "Anglo" students. About 90 percent of the immigrant youth completed high school, compared to 70 to 75 percent of native whites. Punjabi boys earned above-average grades, were more likely than average to take advanced science and math classes, and often aspired to careers in science and engineering. Punjabi girls tended to enroll in business classes, but were less interested in immediate career plans than in satisfying parental wishes that they first marry. This gender difference reflects the strong influence exercised by the immigrant community over its second

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generation. According to Gibson, Punjabi parents pressured their children to avoid too much contact with white peers who might "dishonor" the immigrants, and defined "becoming Americanized" as forgetting one's roots and adopting various frowned-upon traits of the majority—such as leaving home at age eighteen, making decisions without parental consent, dating, and dancing. Instead, Punjabi parents urged their children to abide by school rules, ignore racist remarks, avoid fights, and learn useful skills including full proficiency in English.

The overall success of this strategy of "selective" assimilation to American society is remarkable. Punjabi immigrants were generally poor when they arrived and confronted widespread discrimination. They did not benefit from either governmental assistance or a well-established co-ethnic community. In terms of our typology of vulnerability and resources, the Punjabi Sikh second-generation was very much at risk except for two crucial factors. First, immigrant parents did not settle in the inner city nor in close proximity to any native-born minority whose offspring could provide an alternative model of adaptation to white majority discrimination. In particular, the *absence* of a downtrodden Indian-American community composed of children of previous immigrants allowed first-generation parents to influence decisively the outlook of their offspring, including their ways of fighting white prejudice. There was no equivalent of a Cholo-like reactive subculture to offer an alternative blueprint for the stance that "people like us" should take.

Second, Punjabi immigrants managed to make considerable economic progress, as attested by the number who became farm owners, while at the same time maintaining a tightly knit ethnic community. The material and social capital created by this first-generation community compensated for the absence of an older co-ethnic group and had a decisive effect on the outlook of the second generation. Punjabi teenagers were shown that their parents' ways "paid off" economically and this fact plus their community's cohesiveness endowed them with a source of pride that counteracted outside discrimination. Through a strategy of selective assimilation, Punjabi Sikhs appear to be winning the race against the inevitable acculturation of their children to American-style aspirations.

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The case of Caribbeans in south Florida

Miami is arguably the American city that has been most thoroughly transformed by post-1960 immigration. The Cuban revolution had much to do with this transformation, as it sent the entire Cuban upper-class out of the country, followed by thousands of refugees of more modest backgrounds. Over time Cubans in Miami have created a prosperous community. Signs of this prosperity abound: by 1987, Cubans owned more than 30,000 small businesses, which formed the core of the Miami ethnic enclave; by 1989, Cuban family incomes approximated those of the native-born population; the Cuban community has also developed a private school system oriented to its values and political outlook. In terms of the above typology of vulnerability and resources, well-sheltered Cuban-American teenagers lack extensive exposure to outside discrimination and have little contact with youth from disadvantaged minorities. Moreover, the development of a Cuban enclave has created economic opportunities beyond those in the narrowing industrial and tourist sectors on which most other immigrant groups in the area depend. Across town, Haitian-American teenagers face exactly the opposite set of conditions.

Among the other immigrant groups in Miami, two deserve mention because they face situations intermediate between those of the Cubans and Haitians. Nicaraguans escaping the Sandinista regime during the 1980s were not as welcomed in the U.S. as Cuban exiles, nor were they able to develop a large and diversified community. Yet Nicaraguans shared with Cubans a common language and culture, as well as a militant anti-communist outlook. This common outlook led the Cuban-American community to extend its resources in support of the Nicaraguans, smoothing their process of adaptation. For second-generation Nicaraguans, this has meant that the pre-existing ethnic community providing a model for their own assimilation is not a downtrodden group, but rather one that has managed to establish a firm presence in the city's economy and politics.

Members of a second group, West Indians from Jamaica, Trinidad, and other English-speaking Caribbean republics, generally arrive in Miami as legal immigrants. In addition, many bring along professional and business credentials as well as the advantage of English fluency. These advantages are diminished,

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however, by the fact that these immigrants are seen by whites as identical to native-born blacks and discriminated against accordingly. The recency of West Indian migration and its limited numbers have prevented the development of a diversified ethnic community in south Florida. Hence new arrivals experience the full force of white discrimination without the protection of a large co-ethnic group, and with constant exposure to the situation and attitudes of the inner-city population. These disadvantages put the West Indian second generation at risk of bypassing white or even black middle-class models and instead assimilating to the culture of the underclass.

A recently completed survey of eighth and ninth graders in the Dade County (Miami) and Broward County (Fort Lauderdale) schools by the senior author of this article and Lisandro Perez included sizable samples of Cuban, Haitian, Nicaraguan, and West Indian second-generation children. The study defined youth of the "second generation" as those born in the U.S. who have at least one foreign-born parent, and those born abroad who have lived in the U.S. for at least five years. The survey included both inner-city and suburban public schools, as well as private schools and those in which particular foreign-origin groups were known to concentrate. The sample was divided evenly between boys and girls and included children ranging in age from twelve to seventeen.

There were, as expected, large socio-economic differences among the four national groups. Cuban children in private schools had the best educated parents and those with the highest status occupations. Haitians in public schools had parents who ranked lowest in both dimensions. Nicaraguans and West Indians occupied intermediate positions, with parents whose average education was often higher than that of public-school Cubans, but whose occupational levels were roughly the same. While more than half of private-school Cuban respondents defined their families as upper-middle class or higher, only a third of Haitians and Nicaraguans did so.

Most interesting were the differences in ethnic self-identification. Less than one-fifth of the second-generation students identified themselves as non-hyphenated Americans. The proportion was highest among higher-status, private-school Cubans, but even among this group almost two-thirds saw themselves as "Cuban" or "Cuban-American." Very few Cubans opted for the self-desig-

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nation "Hispanic." Nicaraguan students, on the other hand, used this label almost as frequently as "Nicaraguan."

While none of the Latin students identified themselves as "black American," roughly one-tenth of Haitians and West Indians did so. The self-identification of Haitians was similar to that of Nicaraguans in that both attached less importance to the country of origin and more to pan-national identity than did Cubans or West Indians. In total, about half of the Haitian children identified themselves as something other than "Haitian."

Aspirations were very high in all groups. Although there were significant differences in expectations of completing college, at least 80 percent in each group expected to achieve this level of education. Similarly, roughly 70 percent of the students from each nationality aspired to professional or business careers. This uniformity contrasts sharply with the wide variation in socioeconomic background and reported experiences of discrimination. The Haitians and West Indians reported discrimination two to three times as frequently as did the Cubans. Majorities of both Haitian and West Indian youth reported having been discriminated against and about 20 percent said that their teachers had done so. In contrast, only 5 percent of Cubans in private school reported such incidents; Nicaraguans occupied an intermediate position, with half reporting discrimination and 13 percent reporting discrimination by their teachers.

Unsurprisingly, Haitian and West Indian teenagers were the most likely to agree that there is racial discrimination in the U.S. economy and to deny that non-whites have equal opportunities. Interestingly, they were joined in these negative evaluations by private-school Cubans. This result may reflect the greater information and class awareness of the latter group relative to their less privileged Latin counterparts. However, all Cuban students parted company with the rest of the sample in their positive evaluation of the United States. Roughly three-fourths of second-generation Cubans endorsed the view that "the United States is the best country in the world"; only half of Nicaraguans did so and the two mostly black groups took an even less enthusiastic stance.

The results of this survey illuminate with numbers the "race" between generalized career aspirations and the widely different

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vulnerabilities and resources created by first-generation modes of assimilation. Aspirations are very high for all groups, regardless of origin; however, parental socio-economic background, resources of the co-ethnic community, and experiences of discrimination are very different. These factors influence decisively the outlook of second-generation youth, even at a young age, and are likely to have strong effects on the course of their future assimilation. The importance of these factors is illustrated by the enthusiasm with which children of advantaged immigrants embrace their parents' adopted country, and by the much less sanguine views of those whose situation is more difficult.

A final intriguing fact about today's second generation as revealed by this survey: the best-positioned group (private-school Cubans) is the one least likely to step out of the ethnic circle in inter-personal relationships, while the group in the most disadvantaged position (Haitians) is the most likely to do so. Overall, the three Latin groups overwhelmingly select friends who are also the children of immigrants and who are mostly of the same nationality. Less than half of Haitians and West Indians do the same.

Assimilation and the future

Fifty years ago, the dilemma of the Italian-American youngsters studied by Child consisted of assimilating to the American mainstream and thus sacrificing their parents' cultural heritage versus taking refuge in the ethnic community and forgoing the challenges of the outside world. In the contemporary context of "segmented assimilation," the alternatives have become less clear. Children of non-white immigrants may not even have the opportunity to gain access to middle-class white society, no matter how acculturated they become. Yet joining those native circles to which they do have access may prove a ticket to permanent subordination and disadvantage. Remaining securely ensconced in their co-ethnic community may, under these circumstances, be not a symptom of escapism but the best strategy for capitalizing on otherwise unavailable moral and material resources. As the experiences of the Punjabi Sikh and Cuban-American students suggest, a strategy of paced, selective assimilation may prove the best course for immigrant minorities. But the extent to which this strategy is possible depends on the history of each group and its specific profile of vulnerabilities and resources.

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The politics of school violence

JACKSON TOBY

ON JANUARY 23, 1986, eighteen-year old Eric Hawk, a student at the senior high school in suburban Surrattsville, Maryland, was waiting in the school parking lot to board his bus at the end of the day. Another eighteen-year old student, who had quarreled with Eric before, challenged him to a fight, and, while Eric was removing his coat, stabbed him in the head with a screwdriver that he had stolen earlier in the day from the art room. Eric went into convulsions and died almost immediately. Both Eric and his murderer were black males.

The attack would have resembled many everyday school assaults had it not ended in death. Both the victim and the perpetrator were students who had previously quarreled. (Teachers and other staff members are much less frequently victims of attacks.) Second, both the victim and the perpetrator were males, a perpetrator-victim relationship much more frequent than females attacking females or males attacking females. (Cases of females attacking males are almost nonexistent.) Third, the violence was *intra*racial rather than *inter*racial. (The majority of attacks are of blacks on blacks or of whites on whites, although when *inter*racial attacks occur, the bulk of them are of blacks on whites.) The social characteristics of victims and perpetrators of

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robberies, the second most common form of school violence, are similar.

One consequence of the civil-rights revolution of the 1960s and 1970s was that school administrators in newly integrated schools had to cope with more frequent violent misbehavior of black than of white students. They found themselves in a touchy situation. Despite efforts to increase educational opportunities for black students, despite statements of regret for past injustices and insensitivity, white teachers and administrators were suspected by black students of insincerity when they suspended or expelled black students more frequently than white students. Indeed the more militant black students accused them of being secret racists.

For example, Professor Gerald Grant of Syracuse University studied the evolution of the leading high school in a northern city from 1953 to 1985. "Hamilton High" changed between 1966 and 1971 from an elite high school with an overwhelmingly white student body and an all-white faculty to a more pluralistic school with about 8 percent black enrollment and several black teachers. Some of the black students were from essentially middle-class backgrounds; others came from disadvantaged neighborhoods of the city. Grant reports that black student leaders questioned the principal's commitment to racial justice when he insisted on disciplining several black students who, after a memorial service for Martin Luther King, "rampaged through the school, breaking equipment in a physics laboratory and tearing into the library, where they overturned tables, swept books off the shelves, smashed windows, and tore up floor tiles." In a large meeting with students in the high school auditorium, the principal attempted in vain to convince black students that he was punishing rule violations, not the race of the perpetrators.

In point of fact, racial disproportion in suspensions characterizes not only Hamilton High but secondary schools throughout the United States, as has been repeatedly documented by national surveys conducted by the Office for Civil Rights of the U.S. Department of Education. Thousands of school districts report in detail the racial and ethnic composition of the students in their schools and the racial and ethnic composition of suspended and expelled students. These proportions are carefully compared by staff members of the Office for Civil Rights for

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indications of statistical disparities and thus for evidence of possible discrimination. The critical question, however, is not whether minority students are subjected to school discipline at a higher rate than white students; it is whether the discipline is meted out fairly by a color-blind standard. One may argue that black and Hispanic students in the United States, Jamaican students in England, Arab students in France, and Maori students in New Zealand misbehave to a greater extent than majority-group students in their respective societies because of the disadvantaged family situations and neighborhoods from which minority students come. But whatever the explanation for misbehavior, schools quite properly must deal with it.

However, it is not easy to convince advocates of greater social justice for minorities that disciplining black students at a statistically higher rate than white students is justifiable. They often believe that white teachers have residual prejudice against minorities that leads them to make unfounded charges. This is somewhat similar to the argument that the police, the prosecutors, and the courts discriminate against minority suspects, thereby explaining the disproportionate representation of minorities in American prisons.

In short, questions of what causes school violence and how it can be most effectively controlled are difficult enough. And these difficulties give rise to honest intellectual differences among social scientists. But in addition to the *scientific* questions are *political* differences arising from the fact of more frequent disciplinary measures taken against blacks than against whites to control school violence. This political reality has colored the congressional response to public concern about school violence.

A Senate hearing

When stories of school violence proliferated in newspapers and on television in the early 1970s, Congress felt under pressure to "do something." One thing it did was commission a scientific survey of school violence and vandalism by the Department of Health, Education, and Welfare, which by 1978 resulted in a report called *Violent Schools—Safe Schools*. In addition, Congress conducted its own study through its traditional approach: assignment of the problem to a subcommittee. In the Senate, the study fell to the Subcommittee to Investigate Juve-

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nile Delinquency. The subcommittee's chairman, liberal Senator Birch Bayh of Indiana, scheduled two hearings to enable interested individuals and groups to have their say about (1) the nature of the school violence problem and (2) recommendations for dealing with it.

Just before the first hearing was held in April 1975, the subcommittee released a preliminary report entitled *Our Nation's Schools—A Report Card: "A" in School Violence and Vandalism.* As the following paragraph from the report shows, the report took an extremely sympathetic view of the perpetrators of school violence:

> One common thread of particular interest to the subcommittee running through many of the underlying causes of school violence and vandalism is what may be called the crisis of due process. Quite naturally schools, like other institutions, are compelled to issue rules and regulations concerning the conduct of persons within their jurisdiction. It is clear that without fair and meaningful control and discipline the schools would quickly lose their ability to educate students. Increasingly, though, educators and administrators are finding that the extent of student conduct which is sought to be regulated, as well as the methods of regulation, are causing more problems than they are controlling. A 1975 NEA [National Educational Association] study interviewed a large number of students from different schools and found that "many students spoke of the need for consistent, fair discipline." For example, the subcommittee found that in numerous institutions across the country, school administrators and teachers are embroiled in constant ongoing disputes over restrictions on hair style, smoking, hall passes, student newspapers and a myriad of other aspects of school life.

According to the report, the failings of schools in the area of due process incited students to violence, as did arbitrary expulsions and suspensions. The subcommittee made the connection as follows:

> At first glance it might appear that the expulsion, suspension, pushout, force-out and truancy phenomenon, although certainly tragic for those involved, might at least create a somewhat more orderly atmosphere for those remaining in school as a result of the absence of youngsters evidently experiencing problems adjusting to the school environment. The opposite, however, appears to be the case. The Syracuse study, for instance, found that in schools where the average daily attendance was lower, the disruptions, violence and vandalism rates were higher. This may be explained by the fact that the

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> vast majority of students who are voluntarily or compulsively [sic] excluded from schools do, in time, return to those schools. In many instances their frustrations and inadequacies which caused their absence in the first place have only been heightened by their exclusion and the school community will likely find itself a convenient and meaningful object of revenge.

According to this theory, what is necessary to cure violence and educational ineffectiveness is to make schools more responsive to the needs of children. Schools that arouse frustration and resentment in their students erupt in school crime. On the surface, this theory makes sense: students who resent the rules of unsympathetic adults may seek revenge for perceived unjust treatment. Yet it seems farfetched that arbitrary school rules so enrage students that they rob and steal from each other and from teachers, destroy school property, and assault teachers and fellow students. Although *some* students may seek revenge, consciously or unconsciously, for perceived unjust treatment, the likelihood is that most school crime has other causes than resentment over lack of due process. No doubt the subcommittee staff sincerely believed that lack of due process was a major factor in school violence. But, as will be apparent from testimony at the hearings, there was a political consideration too. Liberals did not want concern over school violence to lead to reduced financial support for social and educational programs—or to unleash punitive measures against minority perpetrators.

At the first public hearing on April 16, 1975, representatives of important constituencies offered their understanding of the nature of the violence and vandalism problem. One constituency, the National Education Association, by far the larger of the two main teachers' unions, represented more than a million and a half public school teachers. Consequently, what its president, James A. Harris, had to say about school violence carried political weight. Mr. Harris went even further than the preliminary report of the subcommittee in trying to avoid blaming the perpetrators for school violence:

> *Mr. Harris:* I first would like to say that when there is a large number of incidents of violence, et cetera, in a school, I feel that it is a reflection upon the school....
>
> We talked about the matter of money, and who is to blame when a child takes money from someone else.

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Well, naturally, the person who takes the money, we have to criticize and place blame on him. However, I think any system that perpetuates children carrying money and places those in an awkward position who do have it to carry, requires a hard, close look. And I think the school lunch program is probably number one in terms of blame in this area....

And, if there were the recognition of the fact that school lunches are school needs, just like books or seats or walls or anything else, and that hungry children cannot learn, and children who do not have money or do not have lunch are apt to do some things that they would not ordinarily do if they did have money or lunch, et cetera, we again might be getting at something that does play a role in here that we are apt to overlook.

We once had fees for almost everything. And now art fees and book fees and this type of thing, in most places, have been eliminated, and it cuts down on the excuse for children to come to school with money.

It also cuts down on the situation where some children are going to be identified as not having money, or not having lunch, or fees, et cetera, and so a lot of the friction would—a lot of the reasons for the friction would be eliminated.

Senator Bayh: Well, how much of this violence and vandalism is related to that kind of theft? I can see how a child that carried $5 or $10 might have trouble. Is a child that is carrying the required amount for the normal school lunch program—which is a relatively small amount—less likely to be victimized?

Mr. Harris: If I could illustrate it just a little bit farther, the problem that we had was that some children did not have money for lunch. So they made a practice, then, of going to the lunchroom and begging from the other children. So, to prevent the children with lunches from having to face this problem, we had children inspected at the door. If they did not have a lunch or a lunch ticket, then they could not go in. That meant we provided a space for them elsewhere.

It became very embarrassing for children to have to sit in this room that was provided for them, because it said "you don't have the money, or you don't have the lunch."

Now children took one of several alternatives. Some would stuff paper in a paper sack and pretend they had lunch, just so that they did not have to go through that embarrassment. Other children would not take that route. If they saw a lunch around, they would steal it. Or they would break in a locker of someone that they knew who did have a lunch on a regular basis. Or they would "shake down" some student that carried lunch money so that they could buy their lunch, and would threaten them if they

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told about it, and so on.

Mr. Harris pushed the discussion of school violence into the realm of soap opera. Albert Shanker, president of the American Federation of Teachers, was also a witness before the subcommittee. The American Federation of Teachers, although the smaller of the two teachers' unions with somewhat fewer than half a million members at the time, represented teachers in some of the largest cities of the United States. Mr. Shanker tried to return the discussion to the reality faced by teachers in violent schools.

> *Mr. Shanker:* I want to reassert the statement that there is a widespread experience of teachers across the country that they are discouraged from reporting incidents, and that reported incidents are not followed up. The two major reasons for this are: (1) the feeling that someone "upstairs" will feel that someone has not done the job right ... and (2) the amount of time that it takes, the additional burden that it places on people who do report.
>
> If we were to go back not too many years ago, we would find when a principal or a teacher ... decided that a student had done this or that and something should be done, that was it. Authority was accepted. There was very little ... due process.... If we were to go back then we would probably compile tremendous lists of injustices that were committed against students who had no opportunity to respond and no recourse.
>
> I think the pendulum has pretty much swung in the other direction now. We find that when a teacher does press a charge for assault almost instantly the student's attorney presses for a countercharge against the teacher for assault.
>
> For example, one has a school with 2,000 students, and if 5 percent of them are involved in activities of this sort ... [the] 100 students involved would take at least 100 court appearances by the principal.
>
> One does not just go to court and receive an immediate hearing. One does wait months until it comes up. But, then one also sits in court and waits. And one comes back a second and third time.
>
> Now, the question in the principal's mind is, "how can he run the school," if there are one hundred such cases, or fifty such cases? I am not arguing against the system of due process, but I am saying that if you provide due process to the person accused, you have got to provide the wherewithal for the administrator. You have got to provide attorneys to represent the teacher who is pressing the charge, or the witnesses, or you have got to provide a

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legal staff for the superintendent and for the principals so that they do not have to be out all the time.

Of course, when it is all over, the judge has to decide whether it is going to be best for the child to send him or her to an institution where he is going to become a hardened criminal, where he is going to be with the worst and most violent cases, whether to allow him or her to roam the streets, or, whether to send him or her back to school.

What one often gets is a system of musical chairs where the punishment is: Do not go back to your school, go back to the neighboring one. There is an exchange of students who engaged in violence with each ... being moved to the other school.

Why should anyone bother going through all that procedure, since this is often the final result?

Mr. Shanker was suggesting as tactfully as he could that the schools were contributing to school violence not by treating students too harshly, as Mr. Harris alleged, but by treating the small number of violence-prone students too leniently. To Mr. Harris' recommendation that allowing students to have a greater role in disciplinary decisions involving other students would reduce student alienation, he pointed out a reality of big-city schools: in many schools students taking such a role "are subject to great danger, especially where gangs are involved." Senator Bayh did not pick up Mr. Shanker's warnings. Instead he returned to a theme raised in the preliminary report of the subcommittee: unfair teachers and administrators provoke violence.

Senator Bayh: It has been brought to the attention of the committee ... that part of the problem with violence and vandalism is that the discipline level is not administered equitably and equally across the board; that students are sometimes expelled without any explanation. Teachers and school administrators are not perfect. They get a story that might be a wrong story and could be explained.... And, if the student is not given a bill of particulars, the reaction might be violence—particularly in the student area where there are racial minorities involved, where a child is very uptight because of prejudice. Although he or she might have committed a grievance that required discipline, if that discipline is not explained to him in detail, it might reawaken all the old prejudices to which they have been subjected.

Now, does *Goss v. Lopez* really create a problem, or is it the kind of thing that might alleviate the problem? [*Goss v. Lopez*, the 1975 Supreme Court decision that limited the right of public schools to suspend misbehaving students summarily, was supported by the

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National Education Association. The American Federation of Teachers and the National Association of Secondary School Principals had expressed reservations.]

Mr. Shanker: I do not think anyone can argue with the simple notion that a student about to be suspended should have a reason why, should have an opportunity to, perhaps, say, I was not there, I was in another part of the building, or whatever the response is. But viewed in terms of a pattern of court decisions, I think one must question whether in the public schools of the United States at the present time, the greater problem is that huge numbers of students are being dealt with unjustly, suspended and expelled, or whether the problem is rising crime, violence, and vandalism. One should view any system of law, due process and administration of law within the schools as moving the pendulum one way or the other, either toward too great a protection of the accused, or toward too great a protection of the victims on the other side. I would say that at this particular juncture in the history of our schools, the great danger is not that we are doing all sorts of terrible things to innocent students.

I would say the greater problem is on the other side—that we do not apprehend, that we do not punish, that we do not remove those who are perpetrating these crimes. In a period where the great problem is that form of injustice, this decision places yet another burden on the teacher, on the administrator and others. Each additional burden which is placed upon them in the administration of some form of justice is going to mean that there will be less pursuit of those who are perpetrating crime.

Hearing no. 2

For the second Senate hearing on school violence (on September 17, 1975), the subcommittee asked representatives of various constituencies what the federal government should do about school violence. The leadoff witness was Marian Wright Edelman, director of the Children's Defense Fund, a graduate of the Yale Law School, and a long-time associate of Hillary Rodham Clinton. Ms. Edelman stressed protecting the rights of minority youth.

Ms. Edelman: We believe that the solution to school violence does not lie in more suspensions but less, for its causes are to found more on the streets where dropouts, pushouts, and suspended students ... pass the time among delinquent gangs in arms or drug trade. I believe it lies in the lack of preparation for decent jobs or in the lack of work even when students are trained; and in the

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> rates of illiteracy and its attendant frustration and anger....
>
> We believe that the following steps are necessary to begin to change existing suspension practices in schools:
>
> 1. We believe the substantive grounds for suspension must be drastically pruned and punishable offenses redefined so that only situations which pose a direct and serious threat to people or property are causes for temporary exclusion from school....
>
> 2. We believe that school disciplinary rules, policies and procedures, and the range of punishments for breaking them, should be made available to students and parents in writing at the beginning of each school term or year.

The Children's Defense Fund was mainly concerned with keeping children in school so that they could receive an education. Ms. Edelman ignored the topic of the hearing—practical suggestions for reducing school violence and vandalism—and implied that disciplining perpetrators of school violence and vandalism was unnecessary. Indeed she seemed to suggest that the topic of school violence had been invented by conservatives to justify suspending and expelling minority students from school for trivial reasons (tardiness, truancy, minor "scuffles" between students).

> *Ms. Edelman:* Blacks were suspended at twice the rate of any other racial group.... Some may claim that higher suspension rates for black children simply reflect greater misbehavior on the part of black students—we disagree with that. We have found what black parents, children, and civil rights groups have charged for years: that there is racial discrimination and insensitivity in the use of disciplinary sanctions.

In newspaper reports of the hearing, Ms. Edelman's charges of racially discriminatory disciplinary practices in schools received wide publicity. Her charges were supported by another witness, Alan H. Levine, the counsel for the Student Rights Project of the American Civil Liberties Union, who said "that there will not be substantial violence and disruption where there is meaningful education." He recommended greater efforts to provide a meaningful education and a student bill of rights to protect students against totalitarian-minded administrators.

Dr. Owen B. Kiernan, executive secretary of the National Association of Secondary School Principals, did not testify at the September 17 hearing, but he sent a statement to be inserted in the record of the hearing, denying the validity of the Children's Defense Fund's statistics about the reasons for suspensions. Dr.

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Kiernan's statement pointed out that the basis for Ms. Edelman's statistics presented at the September 17 hearing was surveys conducted in the homes of suspended students; their parents' unsubstantiated opinions as to the reasons for the suspensions were considered factual. Although the National Association of Secondary School Principals had not conducted surveys of its members on the specific reasons for disciplinary suspensions, Dr. Kiernan announced that the organization would now do so.

> Very few school districts permit the use of suspension for the kinds of minor, nonviolent transgressions of such concern to some of the witnesses before the subcommittee, unless the violation is a repeated one. In these cases, the suspension is actually imposed because of the demonstrated refusal of the pupil to comply with school rules, rather than the particular violation itself. Such continued refusal to follow the rules of the school, even after attempts to solve the problem have been made, would certainly seem to be a legitimate reason for suspension.

On February 23, 1976, Ivan Gluckman, an official of the National Association of Secondary School Principals, transmitted to the subcommittee preliminary results of the group's survey of a random sample of 1,076 American high schools. One finding of the study was that 66 percent of the suspended or expelled students had been warned following a previous infraction that the *next* offense would result in exclusion from school. The National Association of Secondary School Principals argued that its members *always* preferred parental conferences to excluding students and that suspensions (or, more rarely, expulsions) were used only as a last resort. The association was outraged that its members were accused by the Children's Defense Fund of "pushing" students out of school instead of trying to deal with their problems.

None of the persons testifying at either the April or the October hearings disputed the assumption that some kind of intervention by the federal government could reduce school violence. Where the witnesses differed was on the type of intervention they wanted. The liberal position was to recommend greater allocation of funds for educational services. James Harris, Marion Wright Edelman, and Alan H. Levine argued either explicitly or implicitly that school violence would recede when sufficient resources were provided for meaningful education. Insofar as they

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wanted something more from the federal government than money for educational services, they wanted help to prevent teachers and administrators from trampling on the rights of students.

Albert Shanker also wanted greater federal resources for educational services. But Mr. Shanker was far more willing than Mr. Harris, Ms. Edelman, and Mr. Levine to place responsibility for school violence on students unable to conform to reasonable requirements of imperfect but not oppressive schools. Consequently, Mr. Shanker recommended that some additional money be devoted to alternative settings where such students might find education more appealing. Mr. Harris, Ms. Edelman, and Mr. Levine, on the other hand, believed that the *schools* should adjust, not the students. Students, even students who perpetrated assaults and robberies, were the victims of oppressive schools.

Civil litigation as a remedy

Another approach to dealing with school violence, lawsuits by the parents of victimized students against school districts, did not surface at the hearings. It was not until several years later that George Deukmejian, then the attorney general of California, filed suit against the Los Angeles Unified School District, arguing that children compelled by law to attend school have a right to a safe environment in which to learn. In effect, Mr. Deukmejian reversed the logic of the *Goss* decision. Whereas *Goss* maintained that a state, in mandating education, was obliged to protect the right to an education even of students charged with violence, Deukmejian's 1980 suit argued that the compulsory education law created a state obligation to protect potential *victims* of violence. The Court of Appeal of the State of California rejected Deukmejian's argument, holding that what was at stake was a philosophic difference about how much scarce money should be allocated to improve school safety and that this difference should be resolved elsewhere, presumably through school board elections. But the strategy of seeking legal remedies for victims of school violence was still alive. Mr. Deukmejian went on to become governor of California, and, in 1982, the voters of the state approved Proposition 8, known informally as "The Victims' Bill of Rights." One provision of Proposition 8 states:

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Right to Safe Schools. All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

Proponents of Proposition 8 believed it would give victims rights enforceable in the courts. For example, if a student or teacher were injured by a violent student or by an intruder, the victim could sue the school district for damages. Fearful of this possibility, school districts presumably would devote sufficient resources to school security to provide safety for students and staff. Nine years after the hearings, the National School Safety Center, set up at Pepperdine University in California with grants from the U.S. Department of Justice and the U.S. Department of Education, began to spread the message that school districts could be held liable for damages to the victims of school violence.

Legal remedies to deal with social problems often fail to work out as intended, as the history of severe penalties for drunken driving shows. Punishing school districts with damage suits for failing to make schools safe may not work either. In response to the death of her only son at Surrattsville High School, Eric Hawk's mother sued the Prince George's County Board of Education for negligence and won a jury award of $3.1 million in July 1992. (The Board of Education is appealing the verdict.) Meanwhile, however, there has been no rush in nearby school districts to increase the resources devoted to security or even to develop new programs to promote safety. The unpleasant truth may be that devoting additional resources to security would not be an effective way to increase school safety.

The call for stricter discipline

When Congress demanded a study of school violence and vandalism from the Department of Health, Education, and Welfare in the early 1970s, it probably expected a blueprint for federal action. No blueprint emerged. *Violent Schools—Safe Schools* contained *information* about school violence and vandalism, as well as the opinions of teachers, students, and principals about how a violent school might be turned around. But the authors of the report, and presumably its sponsor, the National Institute of Education, did not make their own suggestions.

The recommendations of teachers, students, and principals

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were solicited in response to the question, "If a school had a problem with personal attacks, theft, and property destruction, what could be done to make it safer?" Answers were coded into eight categories: (1) security devices, (2) security personnel, (3) discipline and supervision, (4) curriculum and counseling, (5) training and organization change, (6) physical-plant improvement, (7) parental involvement and community relations, and (8) improve school climate.

Forty-two percent of the teachers and 34 percent of the students selected "discipline and supervision" as an important recommendation. Yet only 15 percent of the principals thought disciplinary measures could make schools safer. And only 12 percent of them claimed success with disciplinary measures in reducing vandalism, personal attacks, or theft *in their own schools*. The principals, who had responsibility for coping with school crime and presumably had given prevention considerable thought, were less optimistic about discipline and supervision than were teachers or students.

As victims and potential victims, students and teachers certainly understood that violence was a possibility at school. But they were being asked to go beyond reporting on *past* personal experiences and, as amateur criminologists, to make judgments about the effectiveness of *future* measures or of greater utilization of existing measures. The principals may have been less optimistic about discipline and supervision because they knew better than teachers and students what disciplinary measures could accomplish. Answers to the following question on the Principal Questionnaire of the Safe-Schools study revealed more precisely the extent of existing disciplinary efforts:

In May, how many students at your school were:
- a. Put on school probation.
- b. Paddled.
- c. Suspended.
- d. Expelled from your school.
- e. Assigned to special day-long class in your school for disruptive students.
- f. Transferred to another regular school because of disciplinary problems here.
- g. At school's initiative, referred to community mental health agency as a disruptive student.
- h. Arrested by the police for incidents occurring at school.

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Schools varied in the extent to which they utilized each disciplinary measure. Thus, 67 percent of the principals replied that no students were suspended in the month preceding the survey, and, on the other end of the distribution, 7 percent reported ten or more students suspended. However, except for paddling, schools in the large cities utilized disciplinary measures more extensively than schools in small cities, suburbs, and rural areas. Despite their efforts, not because they didn't try, the school violence problem was at its worst in the urban schools.

It has been argued that the disciplinary efforts in big-city schools, though greater than in rural or suburban schools, are insufficient to the task. If so, maybe greater use of suspension and expulsion is necessary. However, while everybody favors stronger discipline in the abstract, suspensions and expulsions arouse tremendous political heat, as the hearings showed. The most visible proponent of the view that more expulsions are needed was Joseph Clark, former principal of Eastside High School in Paterson, New Jersey, whose tenure was stormy. When he was hired in 1982, Eastside High was not only dangerously violent; it was also saturated with drugs. Clark expelled 300 students out of 3,000 enrolled in that first year, became a dramatic presence in the halls with his bullhorn and baseball bat, and apparently achieved control. In December 1987, he again resorted to a drastic measure. He suspended sixty students who, according to Mr. Clark, were eighteen, nineteen, and twenty years old, had been in high school for four or five years, were not attending classes regularly, and had no hope of graduating. "I'm tired of parasites, leeches, and mutants who don't want to better themselves," said Clark. "Go out and get a job." Yet despite praise for Mr. Clark from then-President Ronald Reagan and Secretary of Education William Bennett, his insistence that troublemakers and drones don't belong in school (where they can distract conscientious students) has not caught on.

Individual strategies vs. public policies

At the hearings of the Senate Subcommittee to Investigate Juvenile Delinquency in 1975, all the witnesses argued implicitly for a public policy for dealing with school problems, including violence. Local, state, or federal governments should do *some-*

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thing to make the public school system safer and more educationally effective. At precisely the same time, families concerned about the impact of school violence on their children adopted private measures. For families with economic resources, transferring their children to other schools or moving to neighborhoods with reputations for peaceful schools seemed a more promising way to make schools safer for their own kids than, say, joining the local PTA. Of course, flight cannot solve the violence problem for the community as a whole. Although some students escape from "bad" schools by one device or another, many remain trapped. Particularly in economically disadvantaged communities where many parents are preoccupied with personal problems, only a few families are cunning enough or concerned enough to circumvent bureaucratic obstacles to transferring their children out of violent schools. Furthermore, the cumulative effect of an individualistic response by parents is an accelerating process of deterioration of the public schools.

Various public policies have been proposed to promote school safety—for example, spending more public money to recruit intellectually stimulating teachers. Desirable though stimulating teachers are on educational grounds, it sounds romantic to expect that "better" teachers can get students in their classes so interested in their studies that they lose the motivation to steal, to fight, and to deface school property. Teachers cannot be exciting all of the time. Nor are students in class all of the time. What happens when students are eating in the cafeteria or moving through the halls or cutting classes? The good-teacher theory of preventing violence assumes, furthermore, that teachers are stimulating or unstimulating without considering the effect of students upon them. A teacher finds it difficult to be spellbinding while students yawn or curse. And even if it were possible to *recruit* an entire faculty of superb teachers, *retaining* them in schools with unreceptive students would not be easy. Turnover, though high in the teaching profession generally, is at its worst in the low-achieving, high-crime schools.

An analogous romantic strategy pins its hopes on charismatic principals who can "turn around" a violent school. A 1987 Department of Education report cites the following case of such a transformation:

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Samuel Gompers Vocational-Technical High School is located in the South Bronx in New York City. Enrollment is 1,500 students; 95 percent are from low-income families.

In June, 1977, an article in the *New York Times* likened Gompers to a "war zone." Students smoked marijuana and sold drugs both inside the school and on the school grounds; the police had to be called in daily.

In 1979, the school board hired a principal, Victor Herbert, who turned the school around. Herbert established order, implemented a drug awareness program, involved the private sector, and instilled pride in the school among students. Among the actions he took:

- In cooperation with the police captain, Herbert arranged for the same two police officers to respond to all calls from Gompers. These officers came to know the Gompers students; eventually, students confided in the police about drug sales occurring near the school. Police also helped school staff patrol the school grounds and were stationed at a nearby park known for drug trafficking.
- Herbert stationed security guards and faculty outside each bathroom. He organized "hall sweeps" in the middle of class periods and no longer allowed students to leave the premises at lunch time.
- Herbert established a drug education program for teachers, students, and parents that emphasized recognizing the signs of drug use. He also implemented other drug awareness programs that involved the police and community organizations.
- He persuaded companies, such as IBM, to hire students for after-school and summer work. Students had to be drug free to participate. This requirement demonstrated to students that employers would not tolerate drug use.
- A computerized attendance system was installed to notify parents of their child's absence. Newly hired paraprofessionals, called "family assistants," worked to locate absentees and bring them back to school.

The results of these actions were remarkable. The current principal, Gregory Bettantone, reports that in 1986 there were no known incidents of students using alcohol or drugs in school or on school grounds and only one incident of violence. The percentage of students reading at or above grade level increased from 45 percent in 1979-80 to 67 percent in 1984-85.

Encouraging as this sounds, Mr. Herbert accomplished what he did even without making fundamental changes at Samuel Gompers High School. He succeeded by expending enormous energy and creativity: by arriving at the school early and staying

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late, by talking with students in the halls and classrooms, by explaining to teachers why due-process requirements by the courts make it difficult to back them up in disciplinary cases, by watching for intruders, by trying to obtain the cooperation of apathetic parents, by controlling by effort what was possible by decree a generation ago. Such dedication is rare. The personal cost is great. Not only do principals burn out, as do teachers, but some are more competent and dedicated than others to begin with. In short, recruiting superior administrators and teachers is a good idea, but, without a way to bottle charisma, it has inherent limitations. The problem is finding *ordinary* teachers and principals who can maintain order in public secondary schools.

None of these strategies deals realistically with the disorder created by the presence of students and their intruder-friends whom teachers cannot control. Teachers can and do maintain order in schools where the bulk of students care what teachers think of them. Some of these schools are private, some are suburban, and some are selective public schools in big-city school systems. What they have in common is that they adhere more consistently to their educational mission than the chaotic schools in which even students who want an education cannot get it. In disorderly high schools, teacher expressions of approval and disapproval are useless (and sometimes dangerous) because a large number of students have contempt for education and for their teachers. In such schools, many teachers are too intimidated to condemn curses, threats, obscenities, drunkenness, and of course the neglect of homework and other academic obligations.

These well-known facts suggest a politically incorrect strategy for controlling school violence: make high school attendance voluntary, as college attendance is; simultaneously, require some minimum commitment to educational achievement on the part of all high school students, even in the most deprived neighborhoods.

Why this strategy can succeed

American society now provides incentives for academically uninterested students to stay in school and penalties for dropping out. Thus, all states have laws compelling adolescents to attend school, usually until sixteen, although in some states until eighteen, in order to become "educated." In a sense, then, school

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violence is a self-inflicted wound.

Suppose that American society changed its laws and customs so that high school attendance was optional. Such a change would reduce everyday school violence in the United States for the same reason it has prevented high levels of school violence in Japanese high schools where attendance is an opportunity provided by the state but not mandated. In Japan compulsory education ends at the completion of junior high school, when Japanese students are offered a choice between attending high school or not attending high school. Dealing as they do exclusively with voluntary students, Japanese high school teachers are more firmly in control of their high schools, without the help of security guards or of metal detectors, than American teachers are of ours. Japanese high school teachers are not afraid to admonish students who start to misbehave because the overwhelming majority of students care about their teachers' favorable attitudes.

Because the entire high school student body consists of youngsters who *want* to attend, Japanese teachers are able to require of these voluntary students greater studiousness than it is possible to require of involuntary students. Japanese teachers assign a lot of homework, and homework is a major factor in the superior academic performance of Japanese students in international comparisons. But effective teacher control has consequences for school safety too. Japanese high school teachers are hardly ever assaulted by their students; on the contrary, high school students pay attention to their teachers, learn much more than American high school students, and graduate from high school in greater proportions (93 percent) than American students. Some foreign observers assume that this is due to the high value Japanese place on education, but this cannot be the entire explanation. If it were, Japanese *junior* high schools would be as tranquil as the senior high schools, and they aren't. Almost all of the school violence in Japan is at the junior high school level.

Discipline problems afflict Japanese junior high schools because attendance is compulsory, just as it is in the United States. But the discipline problems of Japanese junior high schools are not as serious as those of American junior highs because, for a larger proportion of Japanese students than of American students, the laws are unnecessary. They *want* to go to junior high school as preparation for attending high school. They are con-

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vinced that at least a high school education is necessary for a good job. The rare assaulters of teachers and fellow students usually come from the 7 percent of Japanese students who stop their education after graduating junior high, that is, as soon as they legally can.

Because there is less consensus in the United States that education is crucial for a good future, the United States has not organized society as consistently as Japan has to reward educational achievement.

If attending high school were made voluntary, that is, if it were a responsibility of students and their families, grades in junior high school could be made to have real-world consequences. High schools could admit or not admit students depending on their academic records; consequently, junior high students who wanted to attend high school would have to take schoolwork more seriously. Nevertheless, even with a system of voluntary high schools, occasional dramatic cases of school violence would still occur because (1) the potential for violence is universal, and (2) intruders from the streets would still invade the schools in spite of efforts to keep them out. But all high schools would become essentially safe; and the decline in everyday violence would be most dramatic in inner-city high schools.

There is a tradeoff. The cost of making American high schools voluntary and thereby safe for education is that those students unwilling or unable to be studious would drop out. The benefit would be that meaningful education would occur in all high schools, partly because teachers would no longer be afraid to admonish misbehaving students. Teachers, not security guards, already prevent disorder in most American high schools, but after a certain point—when a group of students are so uninterested in the educational process that they are capable of assaulting their teachers as well as fellow students, and willing to do so—disorder becomes almost impossible to avoid.

The objections

One of the two main arguments against making a high school education voluntary is that education is too important in modern societies to allow adolescents to decide for themselves whether or not they wish to be educated. This objection gains additional force from the disproportionately large number of black and

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Hispanic youngsters whose educational adjustment is precarious.

On the other hand, education is not like imprisonment. It is possible to imprison a person convicted of a crime whether or not he wishes to be imprisoned. But education in a free society requires cooperation between teachers and learners. However much we may *wish* to educate even unwilling students, the American effort to universalize high school education has shown that it is not *possible* to stuff much in the way of English composition, literature, history, geography, and mathematics into the heads of unwilling students. The sensible course would seem to be: try to persuade students that education pays. And when some students are not persuaded and leave school, provide opportunities for them to return when and if they realize that they made a mistake. Students are now permitted to drop out at sixteen in most states; my proposal would permit them to leave upon graduation from junior high school, typically at fifteen.

The other principal reason for opposing voluntary high school attendance is the belief that placing greater responsibility on children and their families for obtaining an education would produce a mass exodus from the high schools. Casting adolescents adrift on the streets with no job skills would, it is feared, enormously increase the crime problem in the community. These fears have little basis in reality. Most American high school students believe, as Japanese high school students do, that at least a high school education is necessary for a satisfying and well-paid job or to prepare for college. If all students in all schools, including inner-city schools, had to be studious—to attend regularly, to do homework, and to pay attention in class, even the violence-prone might elect to stay—and to study; many of them have parents who would oppose their dropping out of school. In any case, there would be no crime wave. The best empirical evidence that criminological research has developed is that, although dropouts commit more crimes than students who remain in school, they do not *increase* their crime rate after dropping out; they had a high crime rate while still enrolled.

Security guards would still be necessary in many schools but not principally to control the behavior of students. Once the predators dropped out, the main function of security guards would be to *keep* them out—until such a time as they were ready to take education seriously and re-enroll. Ex-students, sus-

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pended students, and expelled students contribute disproportionately to the school violence problem now and will be more likely to swell the ranks of predatory intruders when students are required to do more than be recorded as enrolled—to attend classes regularly and to do homework.

What about junior high schools and intermediate schools? The higher academic and behavioral standards that voluntary enrollment would make possible in high schools are likely to seep down into lower secondary schools. Why? Because once high school attendance in a state becomes voluntary, high schools will have the same option that colleges have today: to turn away some applicants. Junior high school students would face the problem of getting accepted at the high school of their choice (as they face it now in Japan). This is happening already in selective big-city high schools like Boston Latin and the Bronx High School of Science and even in popular vocational high schools like Aviation High School in Queens, New York, where 3,139 junior high school graduates applied for admission to the freshman class in 1993, and 480 were accepted. Unfortunately, the present system guarantees junior high school graduates entrance into unselective neighborhood high schools in big cities or into the sole high school in small towns. A disadvantage of this guarantee is that students have neither a sense of accomplishment upon admission to high school, nor an incentive to work in junior high school toward high school admission. Even if high schools rarely rejected junior high school graduates under a mutual choice system, the *possibility* of rejection would make for higher academic and behavioral standards. Teachers would be able to say to junior high school students, truthfully, "If you do not learn what you are supposed to learn in junior high school, you will cut yourself off from later educational opportunities."

Difficult choices

What to do about school violence involves public policy issues of educational opportunity, of crime control, and of racial integration in public schools. The statistical disproportion of black suspensions is interpreted by some as a justified response to worse behavior on the part of black students than white students and by others as a residual effect of racial prejudice.

These issues lay in the background during the 1975 Senate

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hearings concerning school violence before the Subcommittee to Investigate Juvenile Delinquency. Nothing terribly surprising emerged then or since as to what public policy can do to reduce school violence and vandalism, partly because politically acceptable strategies for dealing with school violence have not worked. Efforts have been made to revise the curriculum to make it more relevant or more multicultural, to recruit more "stimulating" teachers or more charismatic administrators, and to make students want to learn by providing guidance and psychotherapy for youngsters who are members of gangs, who are drug sellers or abusers, or who assault their classmates, but everyday school violence continues.

Greater emphasis on *discipline* within the school, vague though it is as a program, is popular with conservatives and viewed with suspicion by liberals. But the disciplinary resources of schools are extremely limited with potentially violent students. Ultimately, only students who want to remain in school will be responsive to whatever disciplinary techniques schools invent. And, unfortunately, violence-prone students are precisely the ones who regard school as little better than a prison.

Reluctantly, *faute de mieux*, big-city school systems have resorted to security systems. In February 1992, when one student in Thomas Jefferson High School shot to death two of his schoolmates, New York City already was deploying 2,700 security officers in its schools, the majority of them in high schools; these officers had metal detectors to search for weapons. After the murders, liberal New York Mayor David Dinkins announced that he would somehow find $28 million to enhance the existing metal detector program to screen for weapons in the most violent of New York City's high schools. But hugely expensive security systems in New York, Detroit, Philadelphia, Los Angeles, and other large cities have not made high schools safe. Inner-city high schools are especially prone to everyday violence.

Isn't it time to try the obvious remedy, insisting that high schools are educational institutions, not recreation centers or holding pens?

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Disorder and the court

GEORGE L. KELLING & CATHERINE M. COLES

IN THE CURRENT debate over what to do about crime in America, national political leaders focus on the "grand" crime issues—capital punishment, gun control, the length of prison sentences, and the number of police on the streets. But on the local level, the terms of debate are much different. There, the issues may seem relatively trivial: panhandling, lying down in public spaces, public drinking and drug use, prostitution, unsolicited window washing, public urination and defecation, loitering, and graffiti. Yet the skirmishes being fought over these issues in areas such as Boston's Dorchester, San Francisco's Tenderloin area, Milwaukee's Near West Side, Seattle's Wallingford area, and New York City's Columbia Heights may well determine whether or not these areas continue to decay.

What is going on? Why do local debates appear to center on problems so different from those focused upon in current national crime legislation? Isn't "serious" crime the real problem? Is it true, as Helen Hershkoff of the American Civil Liberties Union (ACLU) argues, that: "In an effort to deal with the enormous increase in poverty and homelessness in cities across the country during the past decade, numerous municipalities are enforcing, with renewed vigor, long-dormant ordinances prohibiting the destitute from asking members of the public for money"?

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Are we resurrecting Victorian ideas of the "dangerous classes" and returning to the bad old days of arresting people for the "offenses" of poverty and homelessness?

No, we think not. The local issues are far more complex than such formulations would suggest. On the one hand, academics and civil libertarians properly worry about issues such as freedom of speech and due process. On the other, residents in many urban neighborhoods see controlling disorder as a last-ditch effort to restore safety and civility to streets, parks, and other public spaces. Crime statistics may rise or fall; citizens' daily "in your face" street experiences tell them that things are out of control and worsening.

The law

Things have not always been as they are now. For most of American history, in nearly every state and in many municipalities, there were laws against begging, indigence, and traveling about the country without visible means of support.

Following the Depression and World War II, criticism of vagrancy and loitering laws became increasingly common. In 1972, in *Papachristou v. City of Jacksonville*, the Supreme Court struck down an anti-vagrancy statute. Then, in 1983, in *Kolender vs. Lawson*, the Supreme Court struck down a California statute which required that loiterers produce identification and account for their presence on the request of a police officer.

Following the Supreme Court's decisions in *Papachristou* and *Kolender*, other courts overturned many vagrancy and loitering laws under the due process clause of the Fourteenth Amendment. States and municipalities got the message, and as a result police ceased to enforce, and district attorneys to prosecute under, those anti-begging and panhandling laws that remained on the books.

Other localities took a different path, and passed more specific, behavior-directed statutes and ordinances. Both a 1965 Supreme Court decision, *Shuttlesworth v. City of Birmingham*, and a series of New York cases beginning in the late 1960s set forth the rule that while legislation prohibiting loitering alone was unconstitutional, legislation prohibiting "loitering for the purpose of" committing some specific unlawful act, such as prostitution, was acceptable.

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In recent challenges to loitering laws, however, the courts have been presented not only with Fourteenth Amendment due process and equal protection arguments, but with assertions that such laws infringe upon the First Amendment right to free speech. In some cases the courts have found First Amendment concerns sufficiently compelling to overturn even "loitering for the purpose of" laws, signalling a further shift in legal thinking. Legislators have responded by developing laws against very specific behaviors—lying down, asking a person for money more than once, not allowing people to move freely on sidewalks, etc. But even this strategy may not succeed if the courts continue to hold that the First Amendment rights of street people outweigh the countervailing interests of a community. It is this most recent judicial shift that is the concern of this article.

In a word, we believe that many of these decisions have gone too far, interfering with a community's ability to maintain order on its streets, in its parks, and in other public places. Furthermore, we believe that the resulting disorder has had serious social consequences—increasing fear and crime, and driving out law-abiding citizens.

But we believe that the root problem here is a social, and not just a legal, one. That is, in reaching their decisions, the courts have relied on current, popular assumptions about disorderly behavior—the assumptions accepted and promoted by the media, policy makers, and advocates. But, as a growing body of evidence indicates, the assumptions are incorrect. Refuting them must be the first step if we are to change the direction of recent court decisions.

The problem

During the late 1980s and early 1990s, one of the authors of this article worked with New York City's Transit Authority Police Department to study the problems posed by the relatively small group of persons who used the subway to panhandle, "hang out," urinate and defecate, sleep, and consume drugs and alcohol. Passengers were increasingly fearful of this behavior, and surveys revealed that this was contributing to a decline in subway ridership: 97 percent of passengers reported taking some form of defensive action before entering the subway, 75 percent refrained from wearing expensive clothing or jewelry, 69 percent avoided

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"certain people," 68 percent avoided particular platform locations, and 61 percent avoided specific train cars.

Many social advocates and a good portion of the media argued that the problem in the subways was "homelessness," created by a lack of adequate housing and employment. These social advocates and the media were suspicious of relying on the police to address the problem, since the police, in their view, just wanted to "throw the bums out," regardless of the consequences. The advocates believed that those who did not want to allow the homeless to use the subway for shelter were the "well-to-do," who were disregarding the needs and interests of the poor. These assumptions were shared by much of the staff of the Metropolitan Transportation Authority (MTA) and the New York City Transit Authority. Repeated attempts were made to refer this population to agencies, give them food, transport them to shelters (provided by the Volunteers of America with MTA funding), and to bring social workers into the subway. These efforts, however, were for naught. As the number of people attempting to use the subway as a surrogate shelter continued to increase, pressure mounted on the subway's Transit Police Department (TPD) to do something.

The author's analysis—which consisted of observations, public surveys, and a literature review—suggested that popular conceptions were off the mark. Those who used the subway for shelter were a particularly troubled distillate of drug and alcohol abusers, the mentally ill, and criminals. MTA estimates indicated that at least 40 percent of the subway homeless were mentally ill. Substantial portions of the remainder were chronic alcohol and drug abusers. Some were genuinely homeless, but not because they were temporarily out of work or because there was a shortage of homes, as portrayed in the media. To the contrary, many were extraordinarily disturbed and in need of medical and social services. Many others lived off their criminal activities, which included preying on passengers.

The problem in the subway, then, was not homelessness per se; the problem was rule-violating behavior by an extraordinarily troubled group, mostly male, and in large part minority. This finding has been replicated in broader contexts: in New York City, 80 percent of the males in armory shelters abuse drugs or alcohol. In *A Nation in Denial: The Truth about Homelessness*

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(Westview Press, 1993), Alice S. Baum and Donald W. Burnes, both of whom worked with the homeless in social service roles, found that the popular portrayal of the "homeless problem" was way off the mark:

> [N]ewspapers, magazines, books, and television programs reported stories of homeless two-parent rust-belt families temporarily down on their luck or of homeless individuals who had recently been laid off from permanent employment. These stories led policymakers, politicians, and advocates to frame the issue as one of people not having homes and therefore being "homeless." None of these descriptions bore any resemblance to the people we knew. Nor were they consistent with the emerging research, which documented that up to 85 percent of all homeless adults suffer from chronic alcoholism, drug addictions, mental illness, or some combination of the three, often complicated by serious mental problems.

In sum, the terms of the local debate have largely been framed by advocates of a particular, and scarcely disguised, political agenda—an agenda concerned with social injustice, society's inequitable distribution of wealth, and the general victimization of helpless street people. We have no quarrel with this political agenda per se, or attempts to implement it, even through the courts. Moreover, we believe that the concerns raised by homeless advocates are very much worthy of debate. Nevertheless, an alternative perspective exists, and is supported by a substantial factual base. To the extent that courts ignore this perspective, and the facts that support it, and adhere to the usual ideas about the homeless, they are either inadvertently or wantonly supporting a political agenda and obfuscating the complex psychological, social, and economic problems that have led to our current urban crisis.

The consequences

There are serious consequences of misunderstanding our troublesome street population: first, the very real emotional and social disabilities of this population are not recognized, let alone adequately addressed. Second, the enormous social consequences of this group's behavior—that is, the effects on other people—are not recognized. In the remainder of this article, we focus on the second of these consequences.

In many recent decisions, courts have tended either not to

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understand the enormous social consequences of fear and disorder, or to ignore them. Indeed, many have trivialized the problem, as did Judge Robert W. Sweet in *Loper v. New York City Police Dept.*:

> A peaceful beggar poses no threat to society. The beggar has arguably only committed the offense of being needy. The message one or one hundred beggars sends society can be disturbing. If some portion of society is offended, the answer is not in criminalizing these people, debtor's prisons being long gone, but addressing the root cause of their existence.... Professor Kelling's approach would simply remove the messenger of bad news....

Judge Sweet suggests that society is offended by the notion of neediness. Perhaps, partially. But more importantly, individual citizens, of all social classes, are *threatened* by the behavior of, and the implicit and explicit threats made by, serious substance abusers, emotionally disturbed persons, some "peaceful beggars," and criminals. Not just panhandling, but prostitution, public urination and defecation, drunkenness, and obstreperousness all send a chilling message to citizens. This message is: things are out of control. For most citizens, disorder *is* the crime problem.

Disorder and fear

Social science research confirms the link between disorder and fear. This link was demonstrated as early as 1967, when Albert Biderman and his associates found the connection in a survey of citizens in Washington D.C. Likewise Nathan Glazer, in "On Subway Graffiti In New York City" in the Winter 1979 *Public Interest*, suggested that ubiquitous graffiti on subway cars signalled riders that public officials did not have control. And if public officials could not control relatively minor problems such as graffiti, they certainly could not control serious problems such as robbery and assault. Graffiti and robbery were of one ilk to citizens.

The link between disorder and fear was brought to mainstream attention in 1982 when James Q. Wilson and George L. Kelling published "Broken Windows" in the *Atlantic Monthly*. The article identified various violations of community norms that, while often codified as illegal, at times were not: public drinking, panhandling, prostitution, loud music, and graffiti.

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The article discussed the link between disorder and community fear. Also, it argued that just as an unrepaired broken window sends a message that no one cares and invites more damage, so unattended disorderly behavior also acts as a signal that no one cares, with the result of more disorderly behavior and serious crime. Finally "Broken Windows" argued that disorder left unattended leads to a breakdown of community controls, and ultimately undermines the fabric of urban life and social intercourse. But much of this article's thesis was new and untested. Unlike the link between disorder and fear, which had been explored in previous research, the relationship between disorder and crime, and between disorder and further urban decay, had not.

Disorder and serious crime

In his 1990 book *Disorder and Decline* (Free Press), Wesley Skogan confirmed the correlation between disorder and serious crime. Using survey and observational data collected in forty residential neighborhoods in six U.S. cities, Skogan found that: (1) broad consensus existed among members of all racial and ethnic groups as to what constituted disorderly behavior; (2) disorder was a precursor to serious crime; and (3) disorder was also a precursor to further urban decay. By "precursor" to crime and urban decay, Skogan meant that disorder was found in the study to be one of several variables sequentially linked to crime and urban decay. There were other explanatory factors—such as poverty and family instability—but disorder was the single most powerful precursor of both serious crime and urban decay.

Skogan's findings clearly suggest that controlling disorderly behavior is important both because it will reduce fear (which will make people more comfortable in city streets, parks, and public transportation systems) and because it will discourage violent crime and help prevent urban decay. Contemporary experience confirms these findings. Focus groups in New Haven, Connecticut, surveys in the Fenway area of Boston, and interviews with suburbanites near San Francisco and with merchants in Brooklyn all show the same result: disorder creates fear. In response to this fear, citizens have abandoned parks and public spaces, refrained from using public transportation, turned from neighborhood shopping areas to malls, hired private security,

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locked themselves behind doors and barred their windows, purchased dogs and guns, and in some cases deserted cities entirely.

In other words, these findings show that it is crucially important for order to be maintained. When it is not, the social consequences can be severe.

Police discretion

Most contemporary challenges to laws that restrict panhandling and other disorderly behavior allege that such laws allow the police to harass, intimidate, and arrest persons whose only crime is being poor, and that the laws thereby silence panhandlers and the message they send to society about poverty. In Florida and in New York, state courts have voiced the suspicion that laws against disorderly behavior lead to police intimidation of citizens on the streets in poor areas. Certainly police have supplied their critics with much ammunition. Historically, they have often treated African-Americans, among other groups, very poorly. Even recently, renegade police in New York, Detroit, and Los Angeles have captured headlines with their outrageous behavior.

Indeed, the issue at the heart of both policy and legal disputes about the maintenance of order is police discretion: how much police actually have, how much they should have, and how to control it. "Police discretion" is broader than just the individual officer's decision to arrest a person or not. It also includes the allocation of officers to neighborhoods; the establishment of police priorities; the setting of policies for the handling of civil disturbances and use of force, especially lethal force; the adoption of police tactics such as sweeps and undercover decoy units; and the use of other tactics, such as foot patrols—to mention just a few examples. For instance, the decision of the Transit Police Department to enforce rules and regulations aggressively in New York's subways was a discretionary one.

Attempts to influence or control police discretion have taken many forms. University of Wisconsin police expert Herman Goldstein notes several:

> Legislatures have enacted statutes that curtail, clarify, guide, or mandate police actions (e.g., regarding stopping and questioning, strip searches, use of force). City councils have used their budgetary and legislative powers to set police priorities (e.g., marijuana

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enforcement, the decision to prosecute drug cases under federal law) and to control investigations (e.g., surveillance of political groups). The citizenry, through initiatives and referenda, have sought to provide more specific guidance to their police on the issues of local concern (e.g., marijuana enforcement, use of force). Prosecutors have been more assertive in making policy decisions affecting police practices regarding matters that are substantially of concern to them.

Furthermore, the police themselves have attempted to limit discretion by developing guidelines for officers to follow when making important policing decisions.

As we have also seen, courts have attempted to shape police conduct both directly and indirectly. Directly, courts have limited discretion through decisions such as *Miranda v. Arizona* (which requires that a suspect undergoing police interrogation be informed of his rights to an attorney and to remain silent), and *Mapp v. Ohio* (which established the exclusionary rule), both of which restrict criminal investigations, and by endorsing the development of guidelines that police must follow—for instance, guidelines about when police can use deadly force or conduct involuntary searches. Indirectly, courts have limited police discretion by encouraging legislatures to write laws that will pass constitutional muster.

We wish to emphasize that we have no quarrel with attempts to limit police discretion in the ways described above. Carefully crafted, specific laws that give the police "chunks" of authority to deal with a narrow range of problems are worthwhile, benefiting both the police and those they serve. Indeed, we believe that the more specific the law, the better. And, it is important to note, the police would largely concur with us on this.

An example is found in the NYCTA's old "obstructing" rule: it became clear to the task force that "obstructing" was a vague concept which police, and members of our task force, had difficulty defining. The rule left too much discretion to officers, which invited both formal legal challenges and street disputes. Upon closer analysis, we became aware that we were concerned ultimately not with obstructing, but with lying down, a specific behavior that is simpler to discern. (Though "lying down" still had to be defined—for instance, there is a difference between slouching on a bench and lying on it. And is a person leaning against a wall with his or her legs flat out on the ground lying

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down or not?) So, we returned to the Metropolitan Transit Authority's Board of Directors and requested that the rules be changed to forbid lying down rather than obstructing, which the Board did.

Police as good guys

Police misbehavior, and how to avoid it, have been major issues in the United States since the mid-nineteenth century. Retired Brandeis professor Egon Bittner, in a 1978 article in *American History*, drolly described portrayals of early American police: "Of all the institutions of city government in late-nineteenth-century America, none was as unanimously denounced as the urban police. According to every available account, they were, in every aspect of their existence, an unmixed, unmitigated, and unpardonable scandal." Virtually everyone had it in for nineteenth-century police. Progressives wanted to overturn machine politics, to which the police were closely linked. Social work was emerging as a profession, and its practitioners wanted police out of their business. Native urban residents—largely the English and Dutch—castigated the police for their reluctance to enforce vice laws in immigrant neighborhoods. Journalists and muckrakers revealed police scandal after police scandal. And early twentieth-century police thinkers—August Vollmer, Bruce Smith, Leonard Fuld, and others who were allied with the Progressives—portrayed the police in unflattering terms. No one defended the police.

When we read police history more carefully, however, a somewhat more complex picture emerges. What about the immigrants—the Irish, Italians, and Jews who moved into cities? Were they the targets of police abuse? Certainly police arrested some of them (although arrests during the nineteenth century were far less common than today), and we have no doubt that some police abused ethnic minorities.

But it was not as simple as that. Police provided urban residents and newcomers with an array of social services. Police stations were built with extra space, so that migrants who moved to cities would have a place to sleep for several nights until they found work and shelter. Historian Eric Monkkonen, in his book *Police in Urban America: 1860-1920* (Cambridge University Press, 1981), estimates that between 10 and 20 percent of America's

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population in the late 19th century came from families in which at least one member occasionally used police lodging facilities. Were the facilities commodious? No, as a matter of fact they were quite primitive. But in comparison to other social institutions of the time—poorhouses, for example—they probably weren't any worse. The original food and soup lines were also developed by police. Was the food plenteous and wholesome by today's standards? No, probably not. Nonetheless, 19th-century police were, as they are in many inner cities today, important dispensers of social services.

Moreover, during the 19th century, police were taught to get beggars into contact with agencies that might be able to help them. For example, the 1863 Rules and Regulations of the Boston Police Department ordered:

> When any person begs in the street or goes from door to door soliciting alms, it shall be the duty of the officer to inquire the name and abode of such persons, and note the same for record, and to direct such person, if in distress, to the overseer of the poor of the ward where such person resides, or to any charitable association to his knowledge affording relief in similar cases.

Similarly, the 1891 Rules and Regulations of the Joliet (IL) Police Department specified:

> The members of the department, are particularly enjoined to remove all beggars found begging in the streets. If on inquiry, they are found to be proper subjects for relief from the Town Supervisor, they are to be taken to the Town Supervisor, for relief and permanent aid; and if proven to be imposters or vagrants, to take them before the police justices to be dealt with according to law.

The provision of social services was not limited to adults and homeless immigrants: one of the major responsibilities of urban police was finding and returning lost children to their parents, or, if the parents could not be found, referring the children for other social services. So important were police in providing services that Monkkonen has concluded:

> That police did not remain service oriented may have been a missed opportunity to help order American cities; that separate private agencies competed with the police in supplying social services may well have destroyed a potentially useful means of helping ordinary people resist the disorganizing effects of industrialized urban places.

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Hardly police as "an unmixed, unmitigated, and unpardonable scandal"!

In fact, police were often considered *too sympathetic* to urban newcomers. They were reluctant, for example, to enforce vice laws in immigrant neighborhoods. (This is not terribly surprising, since many police were from these neighborhoods.) Industrialists considered urban police so unreliable in policing strikes (the police often sympathized with their working brethren) that, in some states such as Massachusetts and Pennsylvania, state police were created almost exclusively for the purpose of responding to labor unrest.

The police retreat, partially

To extricate themselves from the battles between ward politicians and Progressives—who had very different visions of the business of police—early 20th-century police reformers moved to narrow police functioning to areas about which there was little dispute: felonies such as murder, rape, robbery, assault, and burglary. While the enforcement of laws against Sunday selling ("blue laws"), drunkenness, prostitution, vagrancy, loitering, and other "vices" often pitted groups against each other and put the police in between, serious felonies were universally and unambiguously condemned. *Everyone* agreed that murder, for instance, was a serious problem. And so police became criminal "law enforcers," "crime fighters," and "the front end of the criminal justice system," whose job it was to arrest offenders. Furthermore, so as not to intrude too much into community life, police also became reactive, waiting to be called on the telephone, and frequently waiting until a serious crime had occurred before taking action.

So thoroughly was this strategy indoctrinated into the police culture that, even today, police are reluctant to get involved in order maintenance. When, for example, *Loper* challenged New York's anti-panhandling law in 1991, few police even knew that such a law existed, let alone cared whether or not it was challenged. In the subway, line officers were indignant and even appalled about getting into the business of order maintenance—their job was to fight crime; dealing with the "homeless" was somebody else's job.

Nonetheless, the vast majority of police work in poor areas

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does not involve responding to incidents of "serious" crime; rather, it involves mediating conflicts and solving problems that confront the poor and needy. Police in major cities deal with literally thousands of complex and ambiguous cases each day, and handle most of them to the satisfaction of virtually everyone. Arrests are rare. In sum, every shred of research conducted over the past several decades demonstrates that police deal with an enormous range of problems, criminal and non-criminal, and that virtually every incident with which they deal is incredibly complex.

Take panhandling. What appears passive in one setting may seem aggressive in another: one person standing on a sidewalk at mid-day in a business area with a cup in his hand, quietly asking for quarters, is not particularly threatening; the same person, with exactly the same demeanor, standing at 9 p.m. in front of a brownstone when an elderly person returns and must unlock the door, is ominous. Similarly, four panhandlers standing in front of a restaurant, even if they are not behaving aggressively, may be more threatening than one panhandler in the same place. And just two passive panhandlers, framing each side of a subway entrance after the rush hour, can be menacing.

The condition of the panhandler is also significant. It is one thing to be approached by someone who appears sober and sane; it is quite another matter to be approached by someone who rants and raves, swears at those who pass by, suddenly lunges at other persons, but who, when panhandling, suddenly constrains his behavior. Similarly, an ostensibly courteous—shall we say obsequious—panhandler staggering from an overdose of drugs or alcohol is threatening because he is unpredictable, despite being relatively passive in the act of begging.

Finally, the circumstances of the person being approached are also relevant. A pregnant woman accompanied by a small child is far more vulnerable than is a robust male student. Similarly, a citizen who is moving feels far less vulnerable than one who is standing still.

So, given the complexity of police work, how should we go about providing police with the authority to deal with problems such as panhandling? First, be as specific as possible. Police will welcome specificity. They want neither legal challenges nor street hassles.

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Second, although specificity is desirable, we must also recognize that there are limits to the extent to which laws can be made specific. Every street-wise person understands that dedicated hustlers play games. One can't lie down on the street? Then sit down and quibble about what constitutes lying down. One can't panhandle within so many feet of Grand Central Terminal (as one judge proposed)? Fine, then stay just outside of that perimeter. Or, develop new scams. Hold doors open for "fees." Get cabs for tourists. "Assist" people who are buying tokens for subways. "Direct" cars in public garages. The point is, it is impossible for legislators to frame laws that cover every contingency. Unrealistically specific laws will only lead to an endless "dance" between police and street people. As police move, hustlers adjust; as new laws are developed, police move again, and so on ad infinitum. Passing unrealistically narrow laws will only exhaust police in endless street quibbles.

Third, police must develop clear, formal guidelines for the use of discretion. These guidelines should be developed openly and in collaboration with citizens, prosecutors, and legal counsel. The New York City Transit Police Department worked very hard on this. The result? Although both ejections from the subway and arrests for rule-violating behavior and misdemeanors doubled in 1990, citizen complaints did not rise. Few police departments, however, have considered, let alone developed, guidelines of this sort.

Fourth, we must give up the false belief that police are eager to harass persons, especially minorities and the poor, if given the chance. Given the scope of police work, events of abuse and brutality are extraordinarily rare. Citizens of all ethnic and racial backgrounds recognize disorder and want something done about it. Skogan's research has documented the existence of a broad consensus, which cuts across race and class lines, on what constitutes disorderly behavior. Moreover, while elites and the media may see abuse as the primary policing problem in minority communities, residents point to police under-enforcement and passivity in the face of outrageous street behavior.

Fifth, we must be realistic about how much laws can accomplish. Giving police the ability to arrest persons who act in a disorderly manner will not eliminate the problem. No one really believes that Tampa's "loitering for the purpose of" prostitution

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law, for example, is going to eradicate prostitution. Indeed, more draconian laws than Tampa's have failed in the past.

Finally, the sensational and simplistic views that have dominated thinking about the police must be recognized by the courts for what they are. Research that challenges these views has been piling up, and ought to be taken seriously.

New York, a success story

In late October of 1989, in response to high levels of fear about a worsening crime problem, New York's Metropolitan Transportation Authority began to enforce its rules against panhandling, obstructing passengers, lying down, and other disorderly activities. In November, the Legal Action Center for the Homeless, along with two panhandlers, sued subway officials to overturn the ban on panhandling. Federal District Judge Leonard B. Sand ruled in January of 1990 that begging is deserving of First Amendment protection, and forbade the Authority from enforcing its rule. A month later, the Second Circuit Court of Appeals granted temporary relief from Judge Sand's order, permitting enforcement of the subway regulations; finally, in May of 1990, the Appeals Court reversed Judge Sand's decision, stating:

> The governmental interests in the prohibition of begging in the subway are more fully elucidated when the harms to be avoided are juxtaposed with the good to be sustained. The subway is not the domain of the privileged and powerful. Rather, it is the primary means of transportation of literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation. In determining the validity of the ban, we must be attentive lest a rigid, mechanistic application of some legal doctrine gainsays the common good. In our estimation, the regulation at interest here is justified by legitimate, indeed compelling, governmental interests. We think that the district court's analysis reflects an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good.

With the anti-panhandling rules allowed to stand, serious crime, especially robbery and assault, began a steep decline that has

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persisted through the present. Between 1990 and the end of the first quarter of 1994, robberies were cut by more than 52 percent and all felonies by 46 percent—stunning reductions that greatly exceed those in New York City and other urban centers.

This, then, is a success story. But there have been few attempts to replicate it elsewhere. And even if there were more, it is unlikely that many courts would agree with the Second Circuit Court of Appeals. Of course, restricting behavior on subways is different from restricting behavior on streets. Indeed, the Second Circuit Court's decision was based partially on the difference between city streets—the "quintessential public forum"—and subway stations, platforms, and cars.

But are subway spaces and the "classic public fora"—streets and parks—really all that different? Clearly in a city like New York subways *matter*: they are part of a crucial transportation network, with vast commercial and social importance. But streets and parks matter too. They are more than mere sites for free speech or expression; they also have important social and commercial functions. Duke University professor Stanley Fish, in his book *There's No Such Thing as Free Speech: and it's a good thing too* (Oxford, 1993), recognizes this when he discusses the balancing of individual rights and governmental interests that courts undertake when they approach restrictions on speech:

> [T]he value of the "free speech" interest, which is a real interest, will vary with the underlying purpose for which some social space has been organized. It is only in the most peculiar and eccentric of social spaces, like a Hyde Park Corner, where the production of speech has no purpose other than itself that absolute toleration will make sense, and it is one of the oddities of "official" First Amendment rhetoric that such peculiar spaces are put forward as the norm. That is, First Amendment rhetoric presupposes the ordinary situation as one in which expression is wholly unconstrained and then imagines situations of constraint as special. But the truth is exactly the reverse: the special and almost-never-to-be-encountered situation is one in which you can say what you like with impunity. The ordinary situation is one in which what you can say is limited by the decorums you are required to internalize before entering. Regulation of free speech is a defining feature of everyday life, not because the landscape is polluted by censors, but because the very condition of purposeful activity (as opposed to activity that is random and inconsequential) is that some actions (both physical and verbal) be excluded so that some others can go forward.... When speech does matter, when it is produced in the service of some

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truth or preferred agenda, the sign of its mattering is the fact that only some forms of it will be welcome.

Though the Second Circuit Court of Appeals found that begging was neither speech nor expressive conduct deserving of First Amendment protection, other courts have declined to follow its lead. Indeed, most courts have approached legislation restricting begging and panhandling by attempting to determine in an abstract sense whether begging is speech (or symbolic conduct) deserving of First Amendment protection, without giving the weight that the Second Circuit Court did to public or societal interests. Most courts have found that begging or panhandling constitutes speech by virtue of the fact that beggars may communicate that "government benefits are inadequate" or "there are large numbers of poor and homeless in our country today." Other courts have held that even if the precise words do not carry a protected message, expressive acts do, so that as the *Loper* court suggested, the very presence of beggars conveys a message that society and government have abandoned them.

The logic here is troublesome. Most often, a beggar says something like the proverbial, "Brother can you spare a dime?" and someone else hears it and decides whether and/or how to respond. Calling a request, or often a demand, for money *speech*, however, does not end the matter. No absolute right to speech has ever existed. For the citizen to be told by courts that a street person is making a constitutionally protected statement about social injustice flies in the face of common sense and street experience, when most likely the panhandler is seriously disturbed, under the influence of drugs and alcohol, or seriously ill, but eager to make enough cash hits so that he or she can get more alcohol or drugs. So common is this scenario that Ken Smith, executive director of the New England Shelter for Homeless Veterans in Boston, has publicly requested that citizens not give panhandlers money. Why? Smith claims that the money is used to buy more drugs, which makes rehabilitation more difficult and makes panhandlers unsuitable for any sort of housing, including shelters.

If one begins not with the traditional question "Is begging speech?" (or protected action), but rather with an attempt to balance "the harms to be avoided with the good to be sustained"—to paraphrase the Second Circuit Court's decision—one

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may come to very different conclusions, not only concerning the interests of the public, but also the interests of the beggar.

Ultimately, these issues will be brought to the Supreme Court for settlement. The closest that the Court has come thus far to facing the question of whether begging is deserving of First Amendment protection is in *International Society for Krishna Consciousness v. Lee* (1992), where it dealt with the solicitation of funds (to be paid on the spot) by representatives of an organized religion, and found this to be protected speech. At the same time, the Court found that such speech could be restricted in New York City airport terminals, because they are not "public fora." We do not know whether this opinion will be extended by the Court in the future to include panhandling by individuals.

Even if the Supreme Court should find that begging is protected speech, however, it may well find that such protection is not absolute. If so, panhandling could still be prohibited if there were a compelling governmental interest in doing so. In previous decisions the Court has acknowledged that the cumulative effects of individual acts may be considered in weighing the potential harmful effects of speech or expressive conduct. And a few courts have addressed the rights of individuals to be left alone, or the rights of communities to safe streets.

Nevertheless, most courts have not fully, knowledgeably, or adequately assessed the public and governmental interests in regulating begging and other forms of disorderly behavior. Many courts continue to hold to the philosophical principles that historically underlie First Amendment jurisprudence. While such an approach surely has value, the courts have all too frequently ignored empirical data, and even common sense. The stakes are high. For most citizens, the crime problem in cities *is* disorder.

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Is "rationality review" rational?

ROBERT F. NAGEL

IN THE CULTURE war over homosexuality both sides are deploying heavy rhetorical artillery. The air is full of bold claims and extreme characterizations. Sexual egalitarians often dismiss opposition to the gay and lesbian agenda as prejudice. "Homophobia" is said to deny rights that are basic to human dignity and personal fulfillment and, indeed, to produce misery and suicide. On the other hand, opponents of gay rights describe that movement as an expression of self-indulgent immorality. They depict it as an assault on the sanctity of marriage and the health of children and, ultimately, as a threat to the moral fabric of Western civilization.

The terms of this debate are dismaying because, while exaggerated, they do reflect real and irreconcilable differences of judgment on matters that are crucial to individuals, families, and society. Worse, these judgments are inherently and profoundly uncertain. No one can know whether we are at the beginning of a new era of equality and decency or on the brink of social disintegration. Even partisans, despite the intensity of their arguments, are beset by doubt and ambivalence.

For example, broadcasters sympathetic to the gay cause suppress footage of the more colorful antics of homosexual protesters. Of course, such selectivity is partly an effort to manipulate

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public opinion, but surely it also reflects the journalists' own qualms about the morally and psychologically immature side of gay life. These qualms sometimes show up in the most significant settings. Of those who argue publicly that homosexuality is a fully acceptable "lifestyle," how many are indifferent to the developing sexual identities of their own children?

Cultural conservatives, for their part, sometimes protest that they wish individual homosexuals no harm even while decrying the gay movement as a threat to civilization. Polls consistently show that supporters of Colorado's anti-gay rights initiative, Amendment 2, believe themselves to be opposed to discrimination based on sexual orientation. Such incongruities can be explained by the subtle distinction between tolerance and approval, but in the very fact that opponents of gay rights make this distinction can be seen an implicit recognition of the possible moral force in gay arguments based on personal autonomy and privacy.

American society, then, is locked in a ferocious struggle over defining the morality of sexual behavior, the meaning of psychological health, and the function of family life. The questions are fundamental and momentous, but the answers are uncertain and are doubted even by committed participants. What to do?

The courts step in

Increasingly it appears that the nation's judges will attempt to extricate us from our dilemma. A gathering consensus in respectable circles holds not only that courts should resolve the important disputes about public policy on homosexuality, but that they can do so in a way that does not require anyone to answer the underlying moral questions. As if this bright prospect were not enough, the proponents of a judicial solution even think that their method is compatible with a properly restrained role for the courts.

This sounds too good to be true, and it is. But Americans have given in to such enticements before. One impulse behind the disastrous *Dred Scott* decision was the fatuous hope that the Supreme Court could end the country's growing division over slavery. *Roe v. Wade* was supposed to put the abortion issue to rest, yet two decades later even conservative justices bemoan the unwillingness of the fiercely contending sides to accept the Court's

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"mandate." Given this history, it is important to understand clearly what is being proposed when lawyers hold out the possibility of a judicial solution to the vexing questions presented by the homosexual rights movement.

The emerging consensus on the shape of such a "solution" developed obscurely—in the pages of scholarly legal journals and during strategy sessions of sophisticated litigators. But it became both more public and more legitimate on November 16 of last year, when a three-judge panel of the United States Court of Appeals for the District of Columbia struck down a pre-Clinton Defense Department directive that barred "persons of homosexual orientation" from serving in the military. The judges in *Steffan v. Aspin* did not purport to resolve any broadly significant moral or political issues. They did not decide that homosexual conduct is moral or natural or necessary for fulfillment. They said nothing about family life or how children develop sexual identity. They claimed that they were not displacing military authority and attempted to confine their analysis to "an area of expertise that has long been conceded to the courts." The three judges determined only that the rule was not rationally related to the goals that the Defense Department itself asserted were the objectives of the policy.

Although the full Court of Appeals later decided to reconsider this judgment, elite opinion makers instantly applauded the panel's opinion. Professor Kathleen Sullivan of Stanford Law School told National Public Radio that the reasoning was "extremely moderate." *Steffan* was authored by former Democratic congressman Abner Mikva, but Sullivan suggested that Republican appointees on the Supreme Court might eventually adopt the same analysis. The editors of the *New Republic*, a journal that is usually skeptical about judicial activism, also praised the Mikva opinion and recommended that its approach be employed to resolve the litigation over Colorado's Amendment 2. Newspaper articles appeared, describing how the gay rights movement was now hoping to win battles in courts, if not in legislatures.

It is indeed possible that the Supreme Court will soon begin to vindicate claims of gay rights on the grounds that particular forms of discrimination are irrational. "Rationality review" has a long pedigree. In one form or another, it has been advocated by constitutional scholars as a suitable judicial pursuit for at least

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one hundred years. In recent decades, some of the most eminent law professors, such as Gerald Gunther and the late Alexander Bickel, have praised it as institutionally appropriate for a restrained Court. Cass Sunstein, of the University of Chicago Law School, has proposed that the demand for rationality derives from Madisonian republicanism. Others have described it as a natural implementation of the Fourteenth Amendment's equality principle. Whatever its antecedents, in the modern era both moderate and conservative justices have significant records of relying on rationality review to invalidate laws dealing with various groups, including women, illegitimate children, and the mentally retarded.

It is not hard to see what is so beguiling about this approach. For a court to ask whether a limitation on someone's liberty is at least reasonably related to some valid purpose seems to be a modest demand for justification. Who, after all, is in favor of irrationality? Moreover, there is something almost gallant about this sort of judicial analysis. The rulemaker can define his objective as he wishes, and judges will inquire only whether the rule is related to those objectives. The government, that is, can choose its own weapon. Any institution so inept as to be unable to meet this challenge surely does not deserve to prevail; rank stupidity should get its just reward. Thus judicial review of the rationality of specific policies on sexual orientation holds out the promise of eliding political disagreement and uncertainty. It makes intellectual clumsiness—not the morality or health of homosexuality—the central issue. The power of the courts is confined to focused, specific issues that have been stripped of all imponderable questions and grave implications. Detailed regulatory language is parsed, hard data is evaluated, reason is applied, lawfulness is restored.

All this, unfortunately, is flimflam. To see why, it is necessary to look more closely at the *Steffan* decision. Rationality review, as utilized in that case, is such a palpable deception as to raise the question of why American judges—and, indeed, Americans in general—are persistently drawn to it.

What *Steffan* said

The military policy at issue in *Steffan* declared that homosexuality is "incompatible with military service." It defined a

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homosexual as "a person ... who engages in, desires to engage in, or intends to engage in homosexual acts." Thus the policy authorized discharge not only on the basis of conduct but also on the basis of orientation. The midshipman who prevailed in the case had been forced to resign after he said that he was a homosexual during a conversation with a superior officer.

The military argued that its policy served a number of purposes. Since many heterosexuals do not want to work alongside open homosexuals, the policy protected morale and discipline and aided in recruitment. Moreover, given the close quarters that characterize military life, it prevented invasions of the privacy of heterosexual members of the service. And because (as the court itself acknowledged) it is constitutional to prohibit homosexual conduct, it is rational to reduce this behavior by barring those who have a propensity to engage in it.

Of course, it is possible to condemn the military's policy on a number of strong, but controversial, grounds. Perhaps homosexual conduct is not inconsistent with effective service in the military. Or possibly this conduct is such a valuable personal right that it should be tolerated even if this does impose some costs on the armed services. But once it conceded that the military can seek to prevent homosexual acts, how did the Court of Appeals find it "irrational" for the services to attempt to exclude self-described homosexuals?

The court declared that it is "inherently unreasonable" to presume that a person will break a rule simply because of an intention or desire. Such a presumption, the court said, would penalize a person solely for his thoughts or group affiliations. Hence the policy was not rationally related to preventing homosexual *conduct*, including unwanted advances that might threaten the privacy interests of other members of the service. Moreover, the court said that a rule cannot be justified on the basis of the prejudices of third parties. Hence the policy was not rationally related to morale, discipline, or recruitment. These objectives, said the court, were premised on the distaste or even hatred that substantial numbers of heterosexuals hold for homosexuals.

Whether one approves of the result in *Steffan* or not, it should be obvious that the decision really has nothing to do with means/ends rationality. While labeling the military rule "irrational," the opinion itself demands that the armed services pretend that self-

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declared homosexuals are no more likely than anyone else to engage in homosexual conduct. Moreover, the opinion does not contradict the military's judgment that tolerating homosexuals will lead to disorder and distress within the service and to related difficulties in recruiting as well. In fact, the court assumes the existence of widespread visceral disapproval of homosexuals and gives no reason at all why this "prejudice" is not likely to produce operational difficulties. In short, *Steffan* does not forbid irrationality; it mandates it.

To say that the court's opinion requires an irrational military policy is not to say that the opinion is wrong morally or politically. (By the same token, to say that the military's policy is rational is not to justify it.) It is to say if *Steffan* is right, it is right because of two substantive propositions: that "orientation" is a mental state from which the government can draw no relevant conclusions and thus ought not to sanction, and that private disapproval of homosexuals is a reflection of prejudice which the government cannot take account of in designing its policies. If correct, these propositions mean that the military must (because of the primacy of these constitutional values) behave irrationally if its goal is to reduce homosexual conduct in order to prevent operational problems.

Why, then, did the judges center their analysis around whether the military's policy was rational? It might be thought that "rationality review" is some innocent trope, an odd legalistic convention to be tolerated like powdered wigs on the heads of English jurists. This answer is too easy because it implies that the methods of analysis used to interpret the Constitution are of no real significance. It implies that citizens should ignore the ideas that judges labor over and then put forward as justifications for their assertions of power.

A more serious answer emerges from considering the nature of the two constitutional propositions relied on by the court. These propositions are controversial, both legally and morally. Consider first the claim that under "various common law and constitutional principles" a person's thoughts and group affiliations cannot be used by the government to predict misconduct. Even desire to misbehave cannot be presumed to increase the likelihood of misbehavior. This idea no doubt has some basis in both law and morality, especially in the context of criminal cul-

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pability. As a categorical rule, however, it is profoundly doubtful. It would mean that the military could not assign self-described pacifists to noncombat roles, since such assignments would presume that an intention not to kill might actually lead to a reluctance to kill. It would mean that those who announce that they are sexually attracted to children could not be excluded from positions of trust in public schools, since such exclusion would presume that desire may eventually lead to action.

Now consider the claim that government policies cannot be justified on the basis of the prejudices of third parties. Again, stated abstractly this notion has some attractive moral and legal aspects. But in application it requires a judge to decide which reactions reflect permissible moral sensibilities and which reflect "prejudice." Members of the armed services who vehemently disapprove of homosexuals cannot be presumed to be prejudiced. Indeed, whether strong religious, psychological, and philosophical objections to homosexuality are to be credited or not is the troubling issue that the current culture war presents to every American.

In short, rationality review in *Steffan* is a smoke screen necessary because the crucial propositions that underlie the decision are doubtful and far beyond the competence of any court. Standing alone and unadorned, these propositions would demonstrate judicial arrogance, not restraint. They would belie the ever-attractive hope that judges have some special cerebral technique that enables them to transcend the complexity and riskiness of ordinary public decisionmaking. By indicating precisely what has been transferred from the world of politics to the arena of adjudication, they would confront the American people with their own moral and political insecurity.

Who's at fault?

The intellectual flimflam produced by the Court of Appeals, then, serves some understandable psychological needs of the American people. Is it possible that the people are partially responsible for *Steffan* and other decisions like it? At first it might appear to be a sufficient explanation of rationality review that it enhances the power of judges and other members of the legal elite. Like many other devices used to "interpret" the Constitution, this methodology gives political legitimacy to certain

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forms of verbal facility common in the educated classes. It resolves political disputes by reference to specialized and elevated-sounding argumentative techniques. At most, then, it might seem that the public is being victimized by the kind of elitist conspiracy suggested by Robert Bork some years ago in *The Tempting of America*. But is there any reason to believe that the general citizenry affirmatively participates in its own marginalization?

One reason, of course, is that federal judges are nominated and confirmed by the nation's political leaders. Predictably enough, over the years this process has revealed a considerable range of popular preferences and impulses. Recently, during the summer of 1993 when Ruth Bader Ginsburg was appointed to the Court, the process emphatically registered a generalized desire for activist judging cloaked in legalism and apparent moderation. In fact, the specific jurisprudential form that Ginsburg's moderate legalism takes is rationality review.

Ginsburg was described as a moderate by everyone from President Bill Clinton to Senator Orrin Hatch. In her testimony to the Senate Judiciary Committee, the nominee depicted herself as a legal technician. She said that her approach to law is "neither liberal nor conservative." Her mission is to judge "fairly, impartially ... without fanfare." Judges in our system, she assured the senators, "decide concrete cases, not abstract issues." One of her "most sacred duties" would be "not to read her convictions into the Constitution." All this was consistent with her previous academic writings, which showed Ginsburg to be attracted to the European civil law system where decisions are "faceless" and carry the authority of "the law."

In her academic articles and in her testimony, Ginsburg contrasted the blunt approach to defining the right to privacy in *Roe v. Wade* with the cautiously incremental method taken to resolve sex discrimination cases. This comparison was especially telling because Ginsburg herself worked as an advocate on many of the gender cases. The doctrine that was successful in her cases before the Court was rationality review.

In 1971, for example, she helped to win a decision invalidating an Idaho law that gave preference to males over females in the selection of administrators for estates of those who died without a will. Two years later, she argued and prevailed in a

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case challenging a military policy which presumed that the wives of servicemen were eligible for dependency benefits but required the husbands of female military personnel to prove their economic dependency. In a third case, the Court struck down an Oklahoma law that permitted young women to purchase beer at an earlier age than men. A crucial element in all of these decisions was the determination that, given the announced objectives of each policy, gender discrimination was irrational.

Just as in *Steffan*, however, not only were the laws actually rational, in every instance the Court's "solution" demanded that the government pursue an irrational policy. The law that favored men as administrators of estates was based on the statistical probability that males were—because of the domestic roles historically filled by women—more likely to be involved in business dealings and so more likely to be qualified. To require specific comparisons, as the Court's ruling did, imposed selection costs that the state was seeking to avoid. For similar cultural reasons, wives of members of the armed services were far more likely to be economically dependent than were husbands of servicewomen. The Court's decision forced the military's dependency program to pay benefits to unqualified individuals in numbers far higher than had the policy that was struck down. And, since the Court's own statistics indicated that alcohol-related traffic arrests were about ten times higher for men than for women, equalizing the age at which beer could be purchased must lead either to more accidents or to the needlessly broad denial of a privilege.

What is remarkable is that at the time of her confirmation hearings, Ginsburg's own writings plainly revealed her to be a person who had long understood the "rationality" analysis in these cases to be misleading. In an article published in 1978, for instance, she freely acknowledged that the gender discrimination in Idaho's probate system had helped to reduce both costs and family feuding and that "in general, men [were] more active than women in the conduct of business." The discrimination against women that she had helped to invalidate on the grounds of irrationality was, she wrote, "not without rationality."

Even more remarkable is the fact that Ginsburg also clearly understood the other lesson of cases like Steffan: that obscured beneath the reasoned moderation of rationality review lie far-reaching and highly controversial political objectives. Standing

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alone, each of the sex discrimination cases she helped win may seem to be of limited significance. But collectively they represent the adoption by the federal judiciary of a specific, controversial, and rather severe version of feminism. Ginsburg's writings explain how the important issue in the beer-drinking case, for example, did not involve access to alcohol. The case was important for symbolic reasons. It put the Supreme Court on the side of those who view traditionally feminine characteristics, like caution and self-control, as "invidious" because they may incline women toward domesticity; it validated the male-centered view according to which (as Ginsburg phrased it) the "adventurous, daring" characteristics traditionally associated with "the active boy" are preferable. Before her confirmation hearings, Ginsburg had written often about how the Court was helping to bring about a radical redefinition of the social and psychological status of women. Moreover, she had candidly acknowledged that this alteration was a reaction to massive social changes rather than an application of traditional legal authority. (She had even described the Court's decisions as inconsistent with the intent of the framers of the Fourteenth Amendment.) The decisions amounted, she said, to "boldly dynamic" interpretations sufficiently vast in their implications that they would appropriately have been the subject of amendment.

Ginsburg's version of the feminist agenda is popular in some circles but, of course, over many years the population at large has resisted it by declining to ratify the Equal Rights Amendment. Why in this theater of the culture wars did Ginsburg endorse (and utilize) a judicial methodology that she knew would obscure the significance of the Court's decisions? At least the hint of an answer is provided by her criticism of the bolder approach taken by the Court on the right to abortion. She wrote:

> The sweep and detail of the opinion [in Roe] stimulated the mobilization of a right-to-life-movement and an attendant reaction in Congress and the state legislatures ... [which] adopted measures aimed at minimizing the impact of the 1973 rulings....

That is, large segments of the public mobilized against the Court's abortion rights program because *Roe* was written in a way that made the scope and nature of that program clear. As an alternative, Ginsburg endorsed Paul Freund's suggestion that the

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Court should have declared that the abortion law in *Roe* was "not a reasonable accommodation of interests." This explanation, said Ginsburg, might have averted some of the "bitter debate" that *Roe* aroused. Perhaps she was thinking of her experience with the arcane and apparently ad hoc gender discrimination decisions, which aroused little opposition partly because their controversial moral claims and ultimate objectives were relatively hidden. In short, Ginsburg not only understood that rationality review obscures the real nature of the Court's rulings, but she also saw obfuscation as a practical advantage.

None of this caused Ginsburg difficulty during the confirmation process. Although she had participated in accomplishing through judicial "interpretation" essentially what the people had declined to accomplish through the amendment process, she offered the reassuring veneer of a legal technocrat. In fact, her duel role as feminist crusader and legalistic moderate perfectly captured the ambivalent needs that Americans bring to bear on their judges. The Judiciary Committee voted unanimously to recommend her confirmation, and in the full Senate there were ninety-six affirmative votes.

When a few months later the Appeals Court panel in *Steffan* began a radical restructuring of military life under the guise of reviewing the rationality of a single and specific government policy, it was utilizing an intellectual method that the political branches had only just ratified. What rationality review had done for the cause of feminism it could also do for the status of homosexuals. This route out from distressing political confrontation had the apparent approval of the representatives of the people themselves.

What's the harm?

If the people want to transfer power over divisive issues to the courts, what is the harm? Even the implicit demand that judges exercise this power in a reassuringly misleading and mystifying way deserves some respect. Intellectual clarity and integrity are not the ultimate objectives of government; rituals, symbolism, and sentimental thinking have always had an important place in the serious business of holding societies together.

Strong democrats might reply with some force that the people cannot (or should not) delegate away the right to govern their

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own affairs. The burden of self-government is heavy, and the urge to escape it is one desire that a free people cannot be allowed to indulge. But, of course, the American system is not a pure democracy. The issue is how much self-government we want or should have.

Whatever the larger answers to this question might be, there are some solid reasons to oppose rationality review, especially of disputes over homosexuality. One reason is that judicial decisionmaking that focuses on means/ends rationality is almost entirely unconfined. This is not a matter of abusing the method; it is inherent in the method. All governmental policies are related—but imperfectly related—to some legitimate objective. The degree of imperfection that a judge will tolerate depends upon the jurist's sympathy for the ends being pursued.

Think, for example, of marriage laws. It would be easy enough to demonstrate in court that these laws are not perfectly related to their various objectives. They do not benefit only those who want to raise children, since some married partners have no intention of producing offspring. They do not protect love and commitment, since many married people have neither and some unmarried people have both. They certainly do not prevent sexual promiscuity. To the extent that the laws channel people into heterosexual lives, they can be said to be based on "prejudice" against homosexuality.

Of course, no judge would be compelled to invalidate marriage laws because of such imperfections. But any judge could. Is this unthinkable? Today it seems an unlikely possibility, but it is hardly more unthinkable than that three federal judges would set aside a military policy that over the years represented the collective judgment of presidents, joint chiefs of staff, secretaries of defense, and innumerable members of the armed services. Before the end of this decade it is entirely possible that the courts may choose to redefine the traditional institution of marriage because it excludes homosexuals.

Some may see this as a desirable outcome. Even if it is, no one can plausibly claim that it derives from any direct or indirect delegation to the courts from the people. To the extent that the people have endorsed rationality review, they have endorsed *anything* that the courts might want to do. That, surely, is not a meaningful delegation of authority.

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A second reason to reject rationality review is that it is specially destructive of respect for democratic institutions. It is one thing for a court to set aside a policy on the ground that it transgresses some specifically identifiable limitation on government. It is another to do so on the ground that political leaders have acted in a wholly irrational way. There is now underway a protracted debate at the highest levels of government about what the military's new policy toward homosexuality should be. This debate has involved public discussion during a presidential campaign, detailed congressional hearings, studies and reports by the Joint Chiefs, private research, detailed regulatory decisions by the Defense Department, and so on. All this, as frustrating and dismaying at it may sometimes seem, represents an extraordinarily inclusive and sustained effort to cope with a set of difficult military and political issues. How is the public to appreciate or respect that complex process if five members of the Supreme Court set the resulting decisions aside as irrational?

Rationality review is an assault upon those aspects of political decisionmaking that hold out some hope for coping with emotional and perplexing issues like gay rights. All governmental polices are only imperfectly rational, because political decisionmaking serves many interests and serves them only partially. Policies are also imperfectly rational because lawmaking gives expression to hopes and fears that cannot be validated empirically but are nevertheless honestly felt and deeply important.

Because political decisions can be "irrational," diverse and conflicting groups can be accommodated. Intensity can be acknowledged. Compromise can be encouraged. Bets can be hedged. Mistakes can be reversed. Outrage can be vented. Sometimes, in all the jostling, even understanding and mutual respect can grudgingly begin.

For courts to seize on these messy but highly beneficial components of political decisionmaking as an index of constitutional invalidity is worse than ironic. As the judicial record on issues such as abortion demonstrates, rational solutions—unyielding and simplistic—can tear a polity apart. Moreover, they block and undermine the very processes that might enable us to deal constructively with passionate disputes in which all sides hold some truth but no certainty.

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Why our democracy doesn't work

WILLIAM A. NISKANEN

AMERICAN government does not serve us very well. Moreover, because our periodic elections are only a weak error-correcting process, this has been the case for a long time.

This is an awkward conclusion for a political economist who is not inclined to a radical perspective. Our conventional model of democratic government assumes that, given competitive parties and majority rule, the government will act as an agent of the median voter. The government described by this model has several characteristic problems, especially when there are no effective constitutional limits on its powers, but it is supposed to serve the interests of a majority of the voters quite well.

I have now come to a belief that our conventional model of democratic government is a romantic rationalization of our high school civics lessons. What has led me to this conclusion? The scope and scale of American government are now substantially larger than is consistent with the interests of the majority of voters. Let me briefly summarize the evidence:

- The popular vote for the presidential and gubernatorial

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candidates of the incumbent party has generally *declined* in response to an increase in real per capita government spending since the prior election. The candidate of the incumbent party is often elected (or reelected), despite an increase in government spending, because voters prefer continuity and because they credit the incumbent party for an improvement in general economic conditions.

• People also vote by moving. State population data reflect a general pattern of net migration from states with high per capita government spending to states with lower spending. Similarly, population changes among our major cities are a negative function of the level of per capita government spending.

These types of evidence are strongly inconsistent with the view that the growth of government reflects a broad popular demand for more government services.

Other types of evidence reinforce this perspective.

• Federal spending is more closely related to the capacity to tax and borrow than to objective measures of the demand for federal services. Estimates of the demand for government services based on regression analysis of cross-state data, for example, explain only about one-half of the increase in real per capita government spending over time. Looking at the country as a whole, the government spending share of GNP has increased at a remarkably steady annual rate (the variation that has occurred has been due largely to changes in the unemployment rate and the number of armed forces overseas).

• When the federal government gives a grant to a state or local government, the recipient government increases its expenditures by an amount equal to most or all of the grant. When the same grant is given directly to the population (say, for instance, the federal government decides to supplement the income of the residents of a particular locality), the recipient government still ends up spending more money—since the amount collected in taxes goes up—but the increase in spending is much less than if the grant were given directly to the government. (The response of national governments to foreign aid is quite similar.) The magnitude of this "flypaper effect" is an indirect indication of the ability of government officials to implement their own spending preferences.

• Legislatures routinely approve measures that would not be

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approved by a popular referendum. For example, several weeks after Congress approved the Clean Air Act Amendments of 1990, voters rejected all but a few of about 200 environmental measures on state and local ballots. Last year, Congress approved a substantial increase in federal taxes, even though voters rejected nine of the ten major tax measures on state ballots in 1992. Congress also approved an increase in domestic spending, even though a recent public opinion poll indicates that more than 60 percent of those polled would prefer fewer government services and lower taxes to more services and higher taxes. In Europe, there is a similar pattern—as evidenced by the reluctance of most governments to subject the Maastricht treaty to a popular referendum.

- Every president elected since 1968 has "run against Washington," but the federal share of GNP has continued to increase.
- And many national and regional governments have continued the pursuit of destructive economic policies, without substantial reversal except in the case of financial collapse.

The dilemma posed by the evidence from both political behavior and polls of opinion is that while most people oppose a higher level of total government spending, they are even more vocal in support of spending for programs from which they especially benefit! The calculus of concentrated benefits and diffused costs creates a strong incentive to organize political activity in support of specific programs, even if the sum of the diffused costs is much greater than the benefits. As a consequence, almost all the witnesses at legislative hearings favor higher spending for the specific program being reviewed. The federal budget now finances everything from babysitting to midnight basketball.

I read this broad body of evidence to suggest that the processes of representative democracy lead to a level of government spending, taxes, and regulation that is higher than that preferred by a majority of voters. An oligarchy is using democratic processes to exploit the majority, and is governing in the name of the people but for those who have a special influence on the government.

This perspective contrasts sharply with the more characteristic conservative concern that a populist majority will exploit the property-owning minority. Much redistribution, it turns out, is not from the rich to the poor but from the general population to

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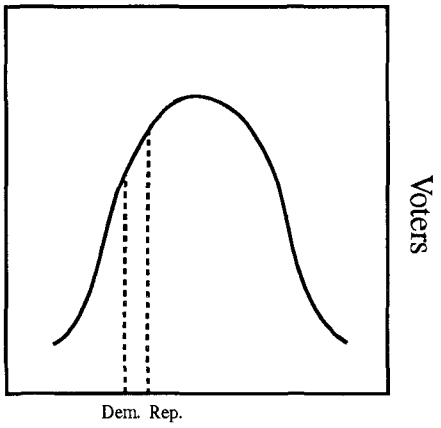
those to whom the agenda-setters are most responsive. Our government is now a democratic leviathan in which voter approval is treated as a constraint rather than as an objective, a difference that is important primarily because our major parties are not very competitive. For the most part, in other words, politicians serve the interests of voters only to the extent necessary for election. And the weak competition between the parties allows politicians substantial discretion to pursue other interests.

What we want vs. what we get

The figure below summarizes my unconventional perspective on contemporary American politics. The vertical axis measures the number (or percentage) of voters who favor a specific level of government spending. The horizontal axis measures the level of government spending. The distribution of preferences at a specific time, in turn, is a function of the distribution of expected tax shares and the level and distribution of current spending. My judgment, in addition, is that the characteristic position of Republican candidates is somewhat closer to the preferred level of spending but that the characteristic position of both major party candidates is to the "left" of the preferred level. This perspective is consistent with the evidence summarized above, but it raises some very awkward questions:



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1) Why do the Republicans lose so many elections? The simple but incomplete answer is that the Republicans, as in 1992, are often "the stupid party." A more informative answer is that the popular vote is a function of conditions other than the level of government spending and that the Republicans have often not been effective in promoting or identifying with these other conditions. In the elections for governor and president, the other major condition is the change in real per capita income since the prior election, and the effect of this condition on the popular vote is substantially larger than the effect of government spending. As a consequence, a substantial increase in government spending is consistent with the election of a candidate of the incumbent party if general economic conditions are satisfactory.

Similarly, in the elections for state legislatures and Congress, the other major condition is the effectiveness of the incumbent as an intermediary with the bureaucracy and in securing preferences for the interests in his or her district. Again, a substantial increase in spending is consistent with the election of a candidate of the incumbent party if the incumbent has been effective in these roles. The 1992 election revealed both a broad discontent with the general performance of Congress and an endorsement of the performance of most individual members. Although congressional term limits were approved in every state in which the issue was on the ballot, almost every member of Congress running in the general election was reelected.

In summary, the popular vote is a vote for (or against) a *package* of conditions specific to each candidate and party. Voters do not appear to have endorsed a higher level of spending, but politicians usually can be elected if their performance or position on other important conditions is satisfactory.

2) Why don't the Republicans move to the right? The simple answer is that Republicans can win elections without endorsing lower spending as long as the Democrats are a high spending party. The more complex answer is that almost all of the agenda setters in American politics—the interest groups, the bureaucracy, the intellectual community, and the media—have a stake in big government, and any move to the right on spending issues is broadly criticized as unrealistic, reactionary, irresponsible, uncaring, etc. The political calculus of concentrated benefits and diffused costs assures that the advocates of big government will

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continue to dominate the "culture of spending."

3) Why don't the Democrats endorse lower spending? The simple answer is that the Democrats can win elections as long as the Republicans make serious mistakes on issues other than spending. The more complex answer is that the Democrats are dependent on party activists who have an ideological or pecuniary stake in big government. Similarly, the role of party activists has led the Republican Party to endorse a position on some social issues that is substantially different from the vote-maximizing position. The role of both party activists and money in elections limits the opportunity for a party to chose a vote-maximizing position on those issues of most concern to these groups. There have been very few major shifts in party positions in American history, but it would be useful to study the conditions that led to these shifts. The Democrats, for example, were generally the small government party through the nineteenth century and were the low tariff party until the 1980s. And in this century, the Republicans were the small defense party until the 1980s.

4) Why doesn't a third party arise on the right? In fact, the largest third party votes in the period since World War II were for candidates on the right, George Wallace in 1968 and Ross Perot in 1992. The American electoral system, however, is strongly biased against third parties. A third party can be successful only when one or both of the major parties splits on a major issue, such as slavery. As a rule, the two major parties can move substantially from the vote-maximizing position without significant risk from a third party. Ross Perot, for example, won 19 percent of the popular vote without winning one electoral vote. The large third party vote on the right, however, supports my view that both major parties are to the left of the policies preferred by the majority.

The political cartel

Our conventional model of democratic government assumes competitive, non-ideological parties that will endorse any policy position that promises to increase their prospect for election. My increasingly grumpy perspective is that our major parties operate as an implicit cartel between ideological Democrats and accommodationist Republicans, in which the Democrats accept the basic structure of the economy and the Republicans accept

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the major activities of the modern state. The intellectual community and the media reinforce this cartel by dismissing any candidate who challenges this understanding. Ronald Reagan was the only presidential candidate to successfully challenge this cartel, winning the contempt of the self-appointed censors and broad popular approval by the voters.

This alternative perspective is not an adequate guide to the future, however, because it is consistent with two quite different outlooks. In my grumpy outlook, the cartel survives. Democrats continue to promote ever higher spending, taxes, and regulation to meet newly discovered public needs and human rights. And the Republicans acquiesce to avoid the charge of being greedy or uncaring. Every president is regarded as a failure, Congress continues to be an object of contempt, a populist and nativist third party rumbles on the right, voters are increasingly alienated, and the economy stagnates—but the cartel survives.

My optimistic outlook is based on the recognition that a government that does not serve the interests of the general population is often much more fragile than is superficially apparent—the most dramatic examples of this, of course, are the recent collapses of most of the world's communist regimes. The accumulating evidence suggests the potential for a major transformation of American politics, a majority coalition for limited, constitutional, *smaller* government.

Nor is this only a recent possibility. The Republicans have long had the potential to exploit it but, as often as not, they have been part of the problem. Federal domestic spending and regulation, for example, increased rapidly under both Richard Nixon and George Bush. Moreover, the Republicans' capacity to lead a broad coalition for smaller government has often been undermined by various errors:

- carelessness about economic growth in 1960 and 1992
- the major political scandal of Watergate
- actions and statements that reinforce the perception that the Republican Party is a class party with a rigid position on social issues (1992) or a dangerous position on military issues (1964).

The immediate challenge for the Republican Party, of course, is to enlist the support of most of the Perot voters without endorsing Perot's more bizarre positions. A coalition of libertar-

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ians, conservatives, and populists will not agree on some issues, nor will any other coalition broad enough to elect a president. For the moment, however, only this type of coalition has the potential to constrain our democratic leviathan.

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The new mercantilism

CHARLES WOLF, JR.

IN ONE OF HIS many insightful observations, John Maynard Keynes noted that "practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist." He noted further that the power of ideas can be immense "both when they are right and when they are wrong," concluding that "it is ideas, not vested interests, which are dangerous for good or evil."

One of these currently captivating ideas is that aggressive government actions—including "strategic trade policy," "industrial policy," and "technology policy"—will bring about increased American "competitiveness" overseas. It can be argued that Keynes' insight is wide of the mark in this instance because the principal sources of these ideas are not defunct, but alive, articulate, and influential. They include such academic economists as Paul Krugman at MIT,[1] John Zysman at Berkeley, Lester

[1]Although Krugman is, in some ways, the intellectual guru of the group, he has recently veered sharply away from it. He argues now that the emphasis on international "competitiveness" is misconceived and even "dangerous," because it diverts attention from the central problems of productivity growth and the domestic economy. See Paul Krugman, *Peddling Prosperity: Economic Sense and Nonsense in the Age of Diminished Expectations*, W. W. Norton, 1994.

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Thurow at MIT, and Laura Tyson, formerly at Berkeley and currently chairman of the Council of Economic Advisors, and numerous well-known commentators and popularizers, including Clyde Prestowitz, James Fallows, Chalmers Johnson, Pat Choate, and Karel van Wolferen. However, Keynes' original insight can be defended by a reasonable counterargument: antecedents of these current ideas can be traced to several defunct mercantilists of bygone centuries, including Jean Baptiste Colbert, Thomas Mun, Antonio Serra, Friedrich List, and Alexander Hamilton, who advocated state action to promote specific exports, to restrict specific imports, and to accumulate gold bullion, trade surpluses and, it was believed, enhanced state power. The current renditions by the new mercantilists are more elegant and sophisticated, but their origins are unmistakable.

"Industrial policy" and "strategic trade policy" differ from one another, in some respects. Industrial policy focuses on the development of key domestic industries and technologies, with international trade accorded a secondary role. Strategic trade policy focuses on international trade, on promoting specific exports and limiting specific imports. Strategic trade policy includes, as well, the use of threats and the imposition of penalties to pry open foreign markets. A recent example is the U.S. threat to impose high countervailing tariffs on Japanese imports—by reactivating the "Super 301" provision of the trade legislation of 1988—unless U.S. exports of automobiles and auto parts reach certain specified shares of Japan's domestic market for these products.

Nevertheless, despite the differences between strategic trade policies and industrial policies, they share a fundamental premise: government should select certain industries, technologies, and firms whose advancement is of "critical" importance for the economy as a whole, and accord the selected ones some form of preferential treatment—whether through subsidies, tax advantages, import restrictions, special efforts to promote exports, or direct government financing for "precommercial development" of putatively critical technologies.[2] To some, "critical" means high technology industries in general (Tyson); to others, it means this as well as certain specific sectors, such as semiconductors

[2]A new government agency—the National Institute of Standards and Technology, formerly the Bureau of Standards—has been given the principal responsibility for this latter task, and a three-fold budget increase to accomplish it.

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(Fallows), or telecommunications, or automobiles, or machine tools, or even rice. In the interest of simplicity, and at a modest cost in precision, I will refer to both sets of policies as "preferential industrial and trade policies," or PITP.

The appeal of PITP to many "practical men" (as well as some impractical ones) is understandable because there are reasonable theoretical arguments as well as empirical evidence and experience to support it. What is usually overlooked by those who accept the arguments for PITP, however, is the existence of strong counterarguments, as well as indications that the usually cited evidence in support of PITP is at best ambiguous, and probably wrong. While the Japanese experience is usually cited in support of PITP, there is a simpler and more compelling explanation for Japan's success. Moreover, if a vigorous set of preferential policies were to be pursued in the context of the U.S. political system, there are strong reasons for expecting them to fail badly.

In the following discussion, I will first summarize the theory that provides support for PITP, next consider the theory's shortcomings, then elaborate a countervailing view, and thereafter suggest why efforts to implement PITP in a pluralistic, interest-group democracy such as our own can be expected to generate costs and mistakes that exceed the potential benefits. Along the way, I will suggest that Japan's notable economic and technological accomplishments—notwithstanding a current recession that has been deeper and longer than the prior one of the United States, and seems likely to continue—are attributable to factors other than Japan's neo-mercantilist policies.

The case for intervention

The intellectual basis for PITP rests on several well-established economic precepts: first, "economies of scale"—the notion that large firms can realize certain efficiencies not accessible to small ones; and second, "economies of learning"—the notion that individuals and firms that have acquired abundant experience are more efficient than those with less.

A corollary of these gains is the existence of certain spillover benefits ("externalities") that are presumed to accrue to other industries or to the economy as a whole. These externalities—benefits external to the firm or industry generating them, and

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not susceptible to its control or exploitation—may be of several types and may arise in various ways. For example, if a firm or industry achieves substantial size, it may provide a large market that redounds to the advantage of feeder industries, firms, and suppliers. Thus the large size of the automotive industry provides opportunities for electronics, tire, lighting, and other component producers that, in turn, enable them to increase their own efficiency through larger scale production. Economists refer to these spillovers as "pecuniary externalities."

Another type of spillover—referred to as "technological externalities"—may result from the experience, learning, and accumulated know-how of the originating firm or industry, and the more highly skilled labor pool that is thereby created, with potential benefits for other firms or industries. The development and remarkable growth of the Internet system, as a result of linking computers and telecommunications, provides a striking example of technological externalities that hugely benefit international business, finance, and commerce.

Is it better to be bigger?

Describing the importance of firm size, Laura Tyson asserts that: "In such [technology-intensive] industries, costs fall and product quality improves as the scale of production increases, [and] the returns to technological advance create beneficial spillovers for other economic activities" (Tyson, 1992). Economies of scale are typically represented by economists in the form of unit costs that decline as the scale of output increases. Economies of scale are traceable to the increased opportunities of large firms for division of labor and specialization of tasks, and for spreading fixed costs over a larger volume of output as production rises. Thus, supermarkets typically can underprice small grocers and profit from doing so. And, at least until recently, it has been presumed that large-scale steelmakers, such as USX or Kobe, can out-compete small steel producers because of the economies of scale the larger firms can realize.

"Economies of learning"—that is, efficiencies resulting from accumulated experience—are also presumed to result in lower costs, and to yield a competitive advantage for firms that have been in business for a long time. Economists use various proxies to measure experience: for example, the cumulative output of

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individual firms, or the cumulative years they have been in business. The premise underlying these proxy measures is that the greater the cumulative output, or the greater the number of years of experience, the more proficient will be the firm's operations and the stronger its competitive position relative to less experienced firms. Thus IBM, General Motors, and Toyota have been presumed—at least in the past—to derive a competitive advantage from their accumulated learning and experience.

Economies of scale and learning, plus the corollary externalities with which they are associated, provide the intellectually respectable ideas that have led many to accept the case for strategic trade and industrial policy. Because of these economies, it is argued, government should establish one or another type of preference or subsidy to "establish a lead in an industry, [and] ... once this lead is established it becomes self-reinforcing and tends to persist" (Krugman, 1991). Tyson refers to the "first-mover advantages" that can be realized by dominant firms and technologies (Tyson, 1992).

It ain't necessarily so

So much for the theoretical arguments for strategic trade policy. The trouble is that there are equally convincing, although less familiar, theoretical arguments against them. There are strong reasons why large size and long experience may entail offsetting risks and disadvantages.

This debit side of the ledger consists of rigidities due to large scale, and the "diseconomies" that may be associated with learning and experience. The effect of these diseconomies may be to place large firms, or firms that have been in business a long time, at a competitive disadvantage. The case for small, new firms, in fact, is as strong as that for large, mature ones. Sometimes Goliath will win, other times David.

An inexact, but still relevant, indication of the disadvantages of large size is the relative change in employment in large and small firms between 1979 and the present: whereas large firms, defined as those with annual sales over $600 million, reduced employment by 29 percent (from 16 million in 1979 to 11.5 million in 1993), employment in small and medium firms grew by 28 percent (from 83 million to 106 million)!

Diseconomies of scale and experience may be especially acute

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in an economy with increasing linkages between domestic and international markets. These linkages produce more rapid product and process innovation due to the faster transmission of information (additions to the Internet have recently been running at a rate of 12 percent per month!), increased trade in goods, services, and intellectual property (between 1986 and 1992 the growth in world trade was more than twice as fast as the growth in world output), and increasing mobility of capital (as reflected in the increasingly close alignment of real interest rates in international markets). In this rapidly changing environment, achievement of large scale and long experience may entail significant drawbacks—specifically, rigidities of scale and learning.

First, consider the rigidities that often characterize large organizations: the hierarchies, bureaucracies, standard operating procedures, and cumbersome administrative routines. These characteristics may create a gap between the production and marketing information that is available *outside* the large organization and the information actually utilized *within* it. The result is slower response and reaction times in large organizations. The limited and dilatory responses of General Motors to competitive challenges in the 1980s, and of IBM, Toyota, Daimler-Benz, Sears Roebuck, and American Express in the 1990s exemplify this tendency. To be sure, there are counterexamples: General Electric, Alcoa, Sony, and the "Baby Bells" following the breakup of AT&T have continued to be innovative despite their size. That diseconomies of scale exist does not imply that they cannot be surmounted, nor that they will always dominate the advantages of size discussed earlier.

Diseconomies of learning and experience can arise in ways similar to those associated with diseconomies of scale. Accumulated learning and experience may have a "lock-in" effect that induces overconfidence, lethargy, and a failure to absorb and respond to product and process innovations. These innovations might, for example, displace or encroach upon the product line or marketing style that the established firm has learned well, practiced long, and would like to protect. Again, there is a gap between the relevant information that is available *outside* the firm and what is actually acquired, absorbed, and utilized *within* it. As a result, the experienced firm may be less receptive to information about innovations than are newer and less experi-

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enced firms. Apple's displacement of IBM in the personal computer business and Intel's major gains over Hitachi in semiconductors are cases in point.

Rigidities of learning may be likened to the familiar left-brain, right-brain duality: overdevelopment of the left brain may impede stimulus and insight from the right. Too much learning of one thing may come at the expense of reduced receptivity to others.

So the strong theoretical arguments in favor of preferential industrial and trade policies confront equally powerful arguments in opposition. Large size and accumulated experience confer initial advantages, but may entail later, offsetting disadvantages. This suggests there may be an optimum size—large, but not too large—and an optimum degree of experience—some, but not too much—for maximum competitiveness. "Practical men" can be liberated from the thrall of PITP by becoming aware that the supporting arguments are less convincing than presumed.

What about Japan?

Whatever the theoretical arguments, Japan's stellar economic performance is typically cited as a compelling example that PITP works. While, in fact, Japan's recent economic performance has been less than stellar—its negative real growth in 1992, and barely positive growth rate in 1993 (and probably also in 1994) are between 2 and 3 percentage points behind the corresponding rates in the U.S.—nevertheless, Japan's economy in the past two decades has seen remarkably rapid growth, aggressive development of high technology industry, and a large and continuing current-account surplus with the U.S. and the rest of the world.

Some observers attribute this record to the industrial and trade policies orchestrated by the Ministry of International Trade and Industry (MITI), and to various predatory Japanese business practices. These policies and practices include *keiretsu* industrial organizations, protection of the domestic market, discriminatory regulatory and contractual practices, and subsidized access to capital for selected manufacturing industries. James Fallows invokes all of these to account for the rapid and profitable development of Japan's semiconductor industry in the 1980s, while discounting if not dismissing the inconvenient fact that the profits and prospects of the principal movers in the industry—Hitachi,

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Toshiba, and NEC—have plummeted sharply in the 1990s. Moreover, even if MITI's trade and industrial policies were successful in semiconductors, its overall batting average looks much less impressive when account is taken of its efforts in other manufacturing industries—notably steel, shipbuilding, and aircraft. For the six-year period from 1987 to 1992, global profits realized in all industries by Japanese businesses were less than one-third of those realized by U.S. businesses, while global sales by Japanese businesses were 20 percent less than those of U.S. firms.

In any event, while MITI's record is at best mixed, Japan's remarkable economic accomplishments over the past two decades can be understood and accounted for by simple explanations, without recourse to Japan's complex industrial and trade policies. The principle known as Ockham's razor suggests that simple explanations should be preferred to complex ones when both are available. Recourse to complexity should be made only when simple explanations prove inadequate.

The most compelling explanation for Japan's formidable economic accomplishments lies in four simple factors, some of which are likely to be transitory:

- Savings—Japan's domestic savings averaged 28 percent of GNP in the 1980s, compared with only 13-14 percent of GNP in the United States.
- Investment—Japan's annual rate of aggregate domestic investment averaged about 24 percent of its gross domestic product in the 1980s, compared with 15-16 percent in the U.S.
- Labor—Japan's work force is highly disciplined, trained, industrious, and literate.
- Management—Japanese managers are energetic, competent, and experienced, and they have learned—through international competition and the powerful dictates of the Japanese work ethic—to strive continually to improve product quality and cut production costs.

Japan's high domestic investment accounts for nearly all of the difference in average annual growth rates between Japan and the U.S. during the 1980s. (This estimate is based on the standard calculation that the ratio between increased investment and increased output is between three and four. During the 1980s,

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Japan invested between 8 and 9 percent more of its GNP than did the U.S., and Japan's annual economic growth exceeded that of the U.S. by 2 to 3 percent.) Also, the investment difference largely explains Japan's strong performance in capital-intensive sectors such as automobiles, consumer electronics, and semiconductors. Investment and savings, taken together, account for Japan's persistent trade surpluses (explained by the excess of Japan's savings over investment), as well as the persistent trade deficits of the United States (explained by the excess of American investment over its savings). To be sure, policymakers in Japan have provided strong incentives to boost both savings and investment: for example, by reducing the taxation of income that is saved rather than spent, by forgoing the taxation of long-term capital gains, and by using a broader interpretation than the U.S. of what can be counted as "research and development" and thus can qualify for special tax advantages. These Japanese macroeconomic policies, which have strongly encouraged savings, long-term investment, and R&D, contrast with policies in the United States that have not. These Japanese policies have also been pursued by a government that, in relative terms, is about 20 percent smaller than that of the United States, as measured by the size of total government spending relative to GDP.

The factors noted above, together with Japan's high quality labor force and its management practices, account for the impressively rapid growth of Japanese productivity, although over the past four or five years the growth of U.S. labor productivity has equaled or exceeded that of Japan.

Once Japan recovers from its current severe recession, the country's savings rate may fall somewhat as a result of rising consumer demand and a population whose proportion of the aged is growing more rapidly than in the past, as well as more rapidly than that in the United States and other industrialized countries. Japan's rate of investment may also drop, due to tighter capital markets and a reallocation of resources from the private to the public sector. As a result, productivity growth will probably decrease.

In sum, application of Ockham's razor suggests that the principal explanation for Japan's impressive economic accomplishments, and for its prominent position in the world economy, is quite independent of its industrial policy and its "strategic," neo-

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mercantilist trade practices.

This conclusion does not mean that U.S. negotiators, dealing bilaterally with the Japanese as well as multilaterally in GATT, should refrain from continued efforts to change Japan's mercantilist policies. On the contrary, the U.S. should seek to bring about liberalization even though it would benefit principally Japanese consumers and only secondarily American exporters (because the exporters in other countries would get some share of the increased trade with Japan that would result). It remains an unresolved question whether these changes are more likely to ensue through direct American pressure (*gaiatsu*), or instead through more indirect means, such as encouraging Japanese consumers to exert pressure internally (*naiatsu*), or through a combation of *gaiatsu* and *naiatsu*.

The politics of preferential policies

Even if the theoretical basis for PITP didn't suffer from the shortcomings discussed above, and even if the example of Japan provided clearer evidence in support, the political realities of attempting to implement such preferential policies in the U.S. would make this an unpromising course to follow.

"Strategic trade policy," "industrial policy," and "managed trade" inevitably imply that some industrial or technological categories—semiconductors, automobiles, electronics, machine tools, pharmaceuticals, or rice—would be chosen for preferential treatment because they are considered "critical" for one reason or another. In response to this, "rational" firms and trade associations could be expected to allocate time, attention, talent, and other resources to obtaining the potential preferences. Whether such efforts took the form of jawboning, elbow bending, contributions to election campaigns, or other forms of lobbying, these redeployments would be at the expense of more economically productive pursuits. The outcome of such interest-group competition would reward the most successful political representations, rather than the most technologically promising firms. There is no particular reason for expecting these two domains to coincide. Even if it could be argued convincingly that computer chips are different from potato chips because the former generate positive "externalities," the case for preferential policies would remain unconvincing because of political considerations. If such

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policies were put into place, a swarm of second- and third-tier claimants would emerge with arguments for inclusion within the preferential safety net. And some of them would no doubt succeed in their efforts.

In sum, whatever the acknowledged shortcomings of the market and the merits of attempting to remedy them, employing preferential public policies toward this end would entail the risk of other shortcomings. That is not to say that remedial public policies should not be considered. Rather, it is to add a note of caution lest attempts to rectify the shortcomings of the market lead to the greater shortcomings of the proposed non-market remedies. Attempted therapies may be as bad as, or worse than, the maladies they are intended to cure. The most promising industrial and trade policy for the United States is to persist in ratifying and implementing NAFTA and the recently concluded Uruguay Round of GATT, thereby promoting more open and competitive international markets for services and intellectual property, as well as commodities.

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Restoring our moral voice

AMITAI ETZIONI

AUDIENCES THAT are quite enthusiastic about the communitarian message, which I carry these days to all who will listen, cringe when I turn to discuss the moral voice. One of my best friends took me aside and gently advised me to speak of "concern" rather than morality, warning that otherwise I would "sound like the Moral Majority." During most call-in radio shows in which I participate, sooner or later some caller exclaims that "nobody should tell us what to do." *Time* magazine, in an otherwise highly favorable cover story on communitarian thinking, warned against busybodies "humorlessly imposing on others arbitrary (meaning their own) standards of behavior, health and thought." Studies of an American suburb by sociologist M. P. Baumgartner found a disturbing unwillingness of people to make moral claims on one another. Most people did not feel it was their place to express their convictions when someone did something that was wrong.

At the same time, the overwhelming majority of Americans, public opinion polls show, recognize that our moral fabric has worn rather thin. A typical finding is that while school teachers in the forties listed as their top problems talking out of turn,

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making noise, cutting in line, and littering, they now list drug abuse, alcohol abuse, pregnancy, and suicide. Wanton taking of life, often for a few bucks to buy a vial of crack or to gain a pair of sneakers, is much more common than it is in other civilized societies or than it used to be in America. Countless teenagers bring infants into the world to satisfy their ego needs, with little attention to the long term consequences for the children, themselves, or society.

How we lost our moral voice

How can people recognize the enormous moral deficit we face and at the same time be so reluctant to lay moral claims on one another? One reason is that they see immorality not in their friends and neighborhoods but practically everyplace else. (In the same vein, they find members of Congress in general to be corrupt but often re-elect "their" representative because he or she is "O.K.," just as they complain frequently about physicians but find their own doctor above reproach.) This phenomenon may be referred to as moral myopia; a phenomenon for which there seems to be no ready cure.

In addition, many Americans seem to have internalized the writings of Dale Carnegie on how to win friends and influence people: you are supposed to work hard at flattering the other person and never chastise anyone. Otherwise, generations of Americans have been told by their parents, you may lose a "friend" and set back your "networking." A study found that when college coeds were asked whether or not they would tell their best friend if, in their eyes, the person the friend had chosen to wed was utterly unsuitable, most said they would refrain. They would prefer that she go ahead and hurt herself rather than endanger the friendship. Also, Daniel Patrick Moynihan has argued convincingly in his recent article in the *American Scholar*, "Defining Deviancy Down," that people have been so bombarded with evidence of social ills that they have developed moral calluses, which make them relatively inured to immorality.

When Americans do contemplate moral reform, many are rather asociological: they believe that our problem is primarily one of individual conscience. If youngsters could be taught again to tell right from wrong by their families and schools, if churches could reach them again, our moral and social order would be on the

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mend. They focus on what is only one, albeit important, component of the moral equation: the inner voice.

In the process many Americans disregard the crucial role of the community in reinforcing the individual's moral commitments. To document the importance of the community, I must turn to the question: what constitutes a moral person?

I build here on the writings of Harry Frankfurt, Albert Hirschman, and others who have argued that humans differ from animals in that, while both species experience impulses, humans have the capacity to pass judgments on their impulses. I choose my words carefully: it is not suggested that humans can "control" their impulses, but that they can defer responding to them long enough to evaluate the behavior toward which they feel inclined. Once this evaluation takes place, sometimes the judgments win, sometimes the impulses. If the judgments always took precedence, we would be saintly; if the impulses always won, we would be psychopaths or animals. The human fate is a constant struggle between the noble and the debased parts of human nature. While I reach this conclusion from social science findings and observations, I am often challenged by those who exclaim "Why, this is what religion taught us!" or as one heckler cried out, "What about the rest of the catechism?" As I see it, while some may find it surprising that religions contain social truths, I see no reason to doubt that the distillation of centuries of human experience by those entrusted with moral education has resulted in some empirically solid, sociologically valid observations.

It is to the struggle between judgments and impulses that the moral voice of the community speaks. The never-ending struggle within the human soul over which course to follow is not limited to intra-individual dialogues between impulses that tempt us to disregard our marital vows, to be deceitful, or to be selfish, and the values we previously internalized, which warn us against yielding to these temptations. In making our moral choices (to be precise, our choices between moral and immoral conduct rather than among moral claims) we are influenced by the approbation and censure of others, especially of those with whom we have close relations—family members, friends, neighbors; in short, our communities. It may not flatter our view of ourselves, but human nature is such that if these community voices speak

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in unison and with clarity (without being shrill), we are much more likely to follow our inner judgments than if these voices are silent, conflicted, or speaking too softly. Hence, the pivotal importance of a community's voice in raising the moral level of its members.

The critics

I need to respond to various challenges to this line of argumentation, beyond the general unarticulated uneasiness it seems to evoke in a generation that has largely lost its moral voice. Some argue that the reliance on community points to conformism, to "other-directed" individuals who seek merely to satisfy whatever pleases their community. This is not the vision evoked here. The community voice as depicted here is not the only voice that lays claims on individuals as to the course they ought to follow, but rather is a voice that speaks in addition to the inner one. When the community's voice and the inner voice are in harmony, this is not a case of conformism, of one "party" yielding to the other, but one of two tributaries flowing into the same channel (e.g., if I firmly believe that it is wrong to leave my children unattended and so do my neighbors, and I stay home, this is hardly an instance of conformism). If these two voices conflict, I must pass judgment not only vis-à-vis my impulses (should I yield or follow the dictates of my conscience?) but also pass judgment on whether or not I shall heed my fellow community members, or follow my own lead. In short, the very existence of a community moral voice does not necessarily spell conformism. Conformism occurs only if and when one automatically or routinely sets aside personal judgments to grant supremacy to the community. That happens when personal voices are weak—far from a necessary condition for the existence of a community voice. To put it differently, while conformism is a danger so is the absence of the reinforcing effects of the communal voice. The antidote to conformism is not to undermine the community's voice but to seek to ensure that the personal one is also firmly instilled.

Above all, it must be noted that while the moral voice urges and counsels us, it is unable to force us. Whatever friends, neighbors, ministers, or community leaders say, the ultimate judgment call is up to the individual. (True, in some limited situa-

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tions, as when a community ostracizes or hounds someone, the pressure can be quite intense, but this rarely happens in modern-day communities because individuals are able to move to other communities when they are unduly pressured, and because they often are members of two or more communities—say of residence and of work—and hence are able psychologically to draw on one community to ward off excessive pressure from the other.)

Others argue that the community voice is largely lost because of American pluralism. Individuals are subject to the voices of numerous communities, each pulling in a different direction and thus neutralizing the others. Or the cacophony is so high that no clear voice can be heard. The notion that no community is right and all claims have equal standing, championed by multiculturalists, further diminishes the claim of the moral voice. The fact is that there is no way to return to the days of simple, homogeneous communities. In any case, these communities were often rather oppressive. The contemporary solution, if not salvation, lies in seeking and developing an evolving framework of shared values—one which all subcultures will be expected to endorse and support without losing their distinct identities. Thus, Muslim Americans can be free to follow the dictates of their religion, cherish their music and cuisine, and be proud of select parts of their history (no group should be encouraged to embrace all of its history). But at the same time they (and all other communities that make up the American society) need to accept the dignity of the individual, the basic value of liberty, the democratic form of government, and other such core values. On these matters we should expect and encourage all communites to speak in one voice.

Other critics argue that the essence of individual freedom is every person following his own course and social institutions leaving us alone. (More technically, economists write about the primacy of our preferences and scoff at intellectuals and ideologues who want to impose their "tastes" on others.) In honoring this pivotal value of a free society, one must be careful not to confuse allusions to freedom from the state's control with freedom from the moral urgings of our fellow community members. One can be as opposed to state intervention and regulation as a diehard libertarian and still see a great deal of merit in people

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encouraging one another to do what is right. (Technically speaking, the reference here is not to frustrating people and preventing them from acting on their preferences, which is what the coercive state does, but rather appealing to their better selves to change or reorder their preferences.)

Indeed, a strong case can be made that it is precisely the bonding together of community members that enables us to remain independent of the state. The anchoring of individuals in viable families, webs of friendships, communities of faith, and neighborhoods—in short, in communities—best sustains their ability to resist the pressures of the state. The absence of these social foundations opens isolated individuals to totalitarian pressures. (This, of course, is a point Tocqueville makes in *Democracy in America*.)

Getting our voice back

In my discussions with students and others about the moral voice, I have borrowed a leaf from Joel Feinberg's seminal work *Offense to Others*. In his book, Feinberg asks us to imagine we are riding on a full bus that we cannot readily leave. He then presents a series of hypothetical scenes that would cause offense, such as someone playing loud music, scratching a metallic surface, handling what looks like a real grenade, engaging in sexual behavior, and so on.

I am interested not so much in the question of what members of the community find tolerable versus unbearable, but what will make them speak up. Hence I asked students and colleagues, "Imagine you are in a supermarket and a mother beats the daylights out of a three-year old child—would you speak up?" (I say "mother" because I learned that if I just say "someone" most of my respondents state that they would not react because they would fear that the other person might clobber them.) Practically everyone I asked responded that they would not speak up. They would at most try to "distract" the mother, "find out what the child really did," and so on. However, when I asked "imagine you are resting on the shore of a pristine lake; a picnicking family, about to depart, leaves behind a trail of trash—would you suggest they clean up after themselves?" Here again, many demurred but a fair number were willing to consider saying something.

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Possibly, my informal sample is skewed. However, it seems to me something else is at work: we have had a consensus-building grand dialogue about the environment. While there are still sharp disagreements about numerous details (for instance, about the relative standing of spotted owls vs. loggers), there is a basic consensus that we must be mindful of the environment and not trash it. However, we have had neither a grand dialogue nor a new consensus about the way to treat children. This would suggest one more reason our moral voice is so feeble and reluctant: too many of us, too often, are no longer sure what to say.

A return to a firm moral voice will require a major town hall meeting of sorts, the kind we have when Americans spend billions of hours in bowling alleys, next to water coolers, and on call-in shows. We need to form a new consensus, such as the kind we have about the environment, civil rights, and excessive general regulation, and are now beginning to have about gay rights. This time we need to agree with one another that the common good requires that we speak up and enunciate communal values. To reiterate, heeding such consensus should never be automatic; we need to examine the values the community urges upon us to determine whether or not they square with our conscience and the basic values we sense no person or community has a right to violate. However, we must also focus on the other side of the coin: it is not enough that individuals attempt to tell right from wrong, as crucial as that is. We must also be willing to encourage others to attend to values we as a community share.

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Four cheers for liberalism?

JERRY Z. MULLER

DURING A DECADE that produced more books about the inadequacies of liberalism than about its intrinsic virtues, among the finest unabashedly liberal works was Stephen Holmes' *Benjamin Constant and the Making of Modern Liberalism* (Yale, 1984). Holmes used Constant as a historical hook upon which to hang an exercise in the retrieval of liberal theory. Holmes explored the eighteenth century arguments that would later come to be known as "liberal" and showed how Constant reformulated those principles under the impact of the French Revolution, especially the experience of government terror wielded in the name of democracy and civic republican virtue. In place of either the ancient republican ideal of a state devoted to civic virtue, the aristocratic ideal of martial virtue, or the ideal of a Christian polity, Constant championed what Holmes called "the de-dramatizing of the political sphere" and the importance of a protected, non-political private sphere as the basis of modern liberty. In contrast to the Aristotelian tradition which insisted that social order is based on unity of purpose and that political communities ought be organized with a view to realizing some highest aim, such as the flourishing of man's political nature, Constant and other liberals insisted that under modern conditions of commercial society, strong but responsible government, and equality before the law enforced by an independent judiciary, social order could be achieved without an overarching moral purpose. In retrieving what he called "the anti-teleological core of liberal theory" Holmes elucidated a central strand of liberal political thought.

In his new book, *The Anatomy of Antiliberalism*,† Holmes makes many of the same analytic points about liberal political

†*Harvard University Press. 330 pp. $29.95.*

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theory, but his emphasis this time is on what he regards as the misguided, confused, and pernicious nature of those whom he dubs "antiliberals"—a remarkably heterogeneous crew which includes the Catholic Royalist and theocratic critic of the French Revolution, Joseph de Maistre; Carl Schmitt, a leading right-wing political theorist in Weimar Germany who became the erstwhile legal theorist of the Third Reich; Leo Strauss; Alasdair MacIntyre; Christopher Lasch; Roberto Unger; and recent "communitarian" theorists. Holmes claims that these writers should be understood as part of a single (if internally differentiated) tradition. The task at hand, as Holmes appears to conceive it, is not so much to anatomize that tradition as to anathematize it—if truth in packaging laws applied to works of political theory, the book would be called *The Pathology of Antiliberalism*. Parts of the book are of great merit and should not be missed, despite the author's Procrustean framework and occasional distortions of the claims of his opponents. The performance as a whole, however, belies the notion that liberals are open-minded—and hence capable of learning from others. For not only is Holmes predisposed against learning from his enemies, he does not learn all he might from his self-proclaimed friends either.

THE BOOK'S STRENGTH lies in its relentless effort to expose the intellectual inconsistencies and confusions of each of the authors discussed, and the inadequacies of their practical alternatives. The chapter devoted to Alasdair MacIntyre's influential book, *After Virtue*, points out that MacIntyre criticizes modern liberal societies on the basis of two different models of virtue which are mutually contradictory. On the one hand, MacIntyre makes a strong argument that the very idea of virtue is dependent upon participation in a shared cultural tradition and as part of a particularistic community. Yet, as Holmes shows, MacIntyre also presents a more Christian and universalistic conception of virtue, as imposed by God on the individual soul. There is a conflict, Holmes shows, between MacIntyre's commitments to the legitimacy of particularism on the one hand, and to the universal claims of Christianity on the other.

In response to Christopher Lasch and to other communitarians who criticize liberal society for a failure to provide fraternity and solidarity, Holmes argues that such critics tend to be vague about the institutional forms of community they hold to be desirable. As a result, they make it impossible to compare the advantages and disadvantages of their prospective communitarian alternative with the vices and virtues of known liberal societies. Holmes also

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shows that MacIntyre and subsequent communitarian critics of contemporary liberalism want to have their cake and eat it too. They seem to demand all the advantages of a supportive culture with none of the disadvantages of a parochial culture, and to envision a culture which provides shared answers to ultimate questions while still preserving the liberal structures which leave all such issues open to ongoing questioning. Holmes is devastating in exposing the contradictions in the work of Roberto Unger, a political theorist at Harvard Law School who is at once communitarian and radically individualist, though on the evidence presented, discovering the contradictions in Unger's work seems as difficult as shooting fish in a barrel.

IF THE STRENGTHS of this book come from the critical dissection of the actual claims of Holmes' opponents, one of its weaknesses is the often distorted presentation of the arguments of those whom Holmes terms "antiliberals." While Holmes complains—correctly—that the claims of classical liberals are often distorted by being taken out of context, Holmes is perfectly happy to use this procedure against *his* targets. He scoffs, for example, at Maistre's claim that written constitutions contrived by a few enlightened scribblers cannot transform society and provide the basis of an ongoing polity. Holmes, with the American experience of constitution-making in mind, responds that such constitutions can survive for centuries as the basis of political life. But he fails to mention that Maistre penned his critique in the mid-1790s as a reflection on the failure of the French constitutions of 1791 and especially the Jacobin constitution of June, 1793, which was indeed cobbled together in a matter of days but never applied because of ongoing political instability. In the two decades immediately thereafter, France would go through several more changes of governmental form; from 1815 through 1871, through half a dozen more. In context, then, Maistre's claim seems far from absurd. Indeed it echoes, in more extreme form (for everything in Maistre is extreme) the claim that written constitutions are only successful to the extent that they comport with the manners and mores of the nation in question: a point emphasized by Burke, as by Montesquieu before him and Tocqueville after him.

The tendency to distort the claims of his opponents is most evident, though by no means confined, to Holmes' treatment of Leo Strauss, to whom he devotes an entire chapter. In the text of that chapter, Holmes treats Strauss as a principled opponent of liberal democracy. Only in a footnote (apparently added in re-

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sponse to several of Strauss' students to whom he sent a draft) does Holmes mention the fact that Strauss maintained that liberal democracy was superior to any other form of government under modern conditions. Strauss did believe that the philosopher ought to respect the fundamental perspectives of the society in which he lives, while trying to improve it by calling attention to its intrinsic dangers, which, he argued, include a propensity toward leveling in democracies, and the confusion of liberty with license in liberal regimes. He therefore combined his defense of liberal democracy with warnings against its inherent weaknesses. To highlight Strauss' skepticism about the self-understanding of modern liberalism is legitimate, but to treat him as a principled opponent of modern liberal democracy seems a victory of enmity over intellectual probity.

WHILE HOLMES' CHAPTER on Strauss includes criticisms that are on target, especially regarding the dangers of esotericism, his treatment relies less upon a reasoned presentation and refutation of Strauss' claims than upon an ongoing appeal to the *ressentiment* of the reader in the face of Strauss' contention that there are higher and lower pursuits, and that the intrinsic danger of liberal democracy is its propensity to emphasize the lower over the higher. Time and again, Holmes characterizes Strauss' position as one of utter disdain toward those outside the tiny elite of philosophers. He does so using characterizations which are presented as Strauss' own, but upon inspection turn out to be something else. Holmes writes, for example, of "what we may call Strauss' doormat theory of the overwhelming majority. Most people are not merely inferior to the philosophical supermen. Their lives are utterly valueless and unjustifiable unless they serve to make philosophers more comfortable and secure." When the interested reader concerned to discover the source of this startling assertion looks to the footnotes, however, he finds a reference not to Strauss' writings, but rather "Cf. John Rawls, *A Theory of Justice*, p. 25," which is presumably intended as the antidote to the Straussian poison. Holmes' references, here as elsewhere in the book, are often difficult to look up, because he makes lengthy assertions without providing references, and lumps references together. When one does look them up, they do not necessarily say what Holmes claims they do. In another example of dubious attribution, Holmes asks "If philosophers are truly autonomous, why should they stoop to 'despising people whose horizon is limited to their consumption of food and their digestion'"—where the quoted phrase is meant to convey

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Strauss' view of his fellow citizens. The reader who makes the effort to turn to the text cited, however, will find that the quoted words are found in the midst of an argument about values in social science which reads:

> It is not necessary to enter here and now into a discussion of the theoretical weaknesses of social science positivism. It suffices to allude to the considerations which speak decisively against this school. (1) It is impossible to study social phenomena, i.e. all important social phenomena, without making value judgments. A man who sees no reason for not despising people whose horizon is limited to their consumption of food and their digestion may be a tolerable econometrist; he cannot say anything relevant about the character of a human society.

Other quotations are similarly misleading.

In other chapters too, Holmes quotes phrases, which, taken out of context, may seem ridiculous, while in context they may be persuasive. He ridicules communitarians, for example, for suggesting that their intellectual insights into the characteristic pitfalls of modern liberal culture may contribute to improving our lot by improving our understanding. He quotes Charles Taylor, who promises "to uncover buried goods through rearticulation—and thereby ... to bring the air again into the half-collapsed lungs of the spirit." Taylor's argument in the book in question (*Sources of the Self*), an argument which Holmes does not mention, is that there is a:

> tendency of modern moral theory to be concerned purely with what it is right to do rather than with what it is good to be. In a related way the task of moral theory is identified as defining the content of obligation rather than the nature of the good life.... [A] powerful array of motives converges ... to discredit qualitative distinctions, to make them appear as intellectually suspect and morally sinister, and to establish a model of moral thinking which tries to do without them altogether.

This insight, taken seriously, may in fact open our mind to possibilities which our dominant intellectual traditions tend to overlook: possibilities to which Holmes, as we will see, remains tone-deaf.

THE LAST THIRD of Holmes' book, entitled "Misunderstanding the liberal past," is incisive and flawed by turns. Here, Holmes attempts to refute the claims of critics of liberal thought and society by quotations from those whom he terms "classical liberals," among whom he includes Spinoza, Voltaire, Montesquieu,

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David Hume, Adam Smith, Jeremy Bentham, James Madison, and John Stuart Mill. This conceptual bed is itself rather Procrustean, and Holmes takes from each thinker only those portions of their thought with which contemporary liberals are most comfortable. As a result, contemporary liberals are protected from having their assumptions challenged by their purported historical forefathers as well as by those whom Holmes deems their enemies. By conflating liberalism and democracy, Holmes ignores entirely the tension between the two, a tension which led earlier liberal thinkers to reject democracy and led later thinkers such as Madison and Mill to focus on mechanisms by which the potential negative effects of democracy could be obviated. The emphasis on the importance of elites in classical liberal thought goes similarly unmentioned.

ANOTHER EXAMPLE OF trimming liberalism past to fit liberalism present is evident in Holmes' references to Adam Smith. Holmes quotes Smith to buttress his point that classical liberals opposed martial values. But he leaves unmentioned Smith's acute historical awareness of the link between national defense and the preservation of civilization, which led Smith to characterize the art of war as "certainly the noblest of the arts," and to insist on the primacy of defense over economic considerations in trade policy. Because they are at odds with the predilections of contemporary liberalism, Smith's works on the moral education of the passions and the institutions through which men learn self-control, prudence, and benevolence are ignored by Holmes. Smith's *Theory of Moral Sentiments* is mentioned once, though in a manner which misses Smith's point. To contradict the claim that liberals ignored duties and obligations, Holmes quotes Smith's statement that "a sense of duty is the only principle by which the bulk of mankind is capable of directing their actions," but its significance escapes him. In context, Smith's statement meant that most men acquire a tolerably moral character less through rational reflection than through social interaction, through "discipline, education, and example," and that intellectuals concerned with creating a decent liberal society ought therefore to pay attention to the sorts of moral rules and models that are conveyed by social institutions.

Holmes makes the excellent point that the arguments of past liberal thinkers are often misunderstood by the process he calls "antonym substitution." Classical liberal arguments are distorted, he shows, by failing to consider the polemical context in which they appeared and the claims which they were originally in-

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tended to oppose. Antiliberals, Holmes writes, view the purportedly liberal maxim "I can do whatever I want" as nihilistic self-indulgence, by contrasting it to the precept "I shall do whatever morality requires." But the original antonym of "I can do whatever I want" was "I must do whatever my master or my social rank demands." The point is well taken. What Holmes fails to note, however, is that the conception of liberty among contemporary liberals too often reflects precisely the understanding that antiliberals mistakenly attribute to eighteenth-century liberals.

Indeed, Holmes too falls into this trap. After providing his improved genealogy of classical liberal claims, one assumes Holmes would address the question, "What are the social institutions through which the appropriate morality is to be inculcated in a society without legal inequality and inherited rank?" This is the tack taken by an important, but lamentably overlooked work of contemporary liberal thought, namely William Galston's *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge, 1991). Holmes, by contrast, does not address such questions, in keeping with an influential strand in contemporary liberalism which deems such issues fundamentally illiberal, since they imply discrimination among different ways of life.

RATHER THAN assuming that contemporary liberalism might have something to learn from its present critics or from earlier liberals, Holmes proceeds as if the most reliable means of avoiding the faults of one extreme is to embrace its opposite. Holmes rightly reminds us that classical liberals had an instrumental attitude toward the state: it was to provide peace, security, welfare, and equitable justice not because these are the only goals of life, but because these are "the preconditions for the pursuit of other goals in various nonpolitical but nevertheless social domains." But from the self-evident statement that "A politics aimed at transforming souls is not always benign," Holmes appears to conclude that it is always malign. Classical liberals, he writes, "denied state authority the right to suppress all moral differences"—from which he appears to conclude that the state is illiberal when it suppresses any moral differences, fosters some social institutions over others, or fosters any sort of consensus. As a result, there is no room in Holmes' conception of liberalism for the state to concern itself with the institutions that play a role in the education of desire.

Among the early modern liberal thinkers, Holmes writes, "An egalitarian emphasis on the 'subjectivity' of value judgments ... helped deflate moral imperialisms.... It was not meant to destroy

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morality itself." Holmes is right about the intentions of early modern liberals, but critics of contemporary liberalism are concerned as much with the unintended consequences of liberal thought. What does unite thinkers such as Strauss and MacIntyre is their skepticism about the following argument, which Holmes makes no effort to refute, and that he seems to accept. "All men," goes this familiar form of contemporary liberal reasoning, "have equal political rights; that is because all men are equal; but men have different preferences, and so those preferences too must be equal; since to favor one set of preferences over another would be to deny the equality of individuals, we have no way of deciding between those preferences; moreover, once we favor some preferences over others, we show a lack of respect for diversity, and for keeping our mind open to other arguments."

Holmes quotes Montesquieu's contention that "liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will." But Holmes leaves this point entirely undeveloped, as indeed he must, given an understanding of liberalism which differs from that of many of the early modern thinkers whom he claims as his forebears. Holmes defines the cultivation of shared norms as "moral imperialism," and defines liberalism (as John Stuart Mill did, but as earlier liberals would not have) as "the equal right of others to be different"; the Lockean principle of religious tolerance is transformed into "the acceptance of diversity." (Though this tolerance has its limits: in Holmes' book, the word "religion" is variously paired with "bigot," "fanatics," "Inquisition," and "Saint Bartholomew's Day Massacre." His true master is Voltaire.) From the substance and tenor of Holmes' argument, the alternatives that lie before us are either a liberal state which cultivates only virtues such as "reasonableness, independence, reluctance to resort to violence, tolerance for diversity, a refusal to humiliate others publicly, and a willingness to listen to the other side of the argument"—or fascism. Indeed it is this implicit choice of alternatives which gives Holmes' book its structure and much of its polemical force.

THE FIGURES CHOSEN by Holmes for his genealogy of antiliberalism are selected tactically, rather than for their representativity or intrinsic importance. In his earlier book on Benjamin Constant, Holmes traced "the permanent structure of antiliberal thought" to Maistre's less flamboyant contemporary, Louis de Bonald. Maistre, while certainly an antiliberal thinker, is more noteworthy for his fanaticism than for his representative

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status, and he is a highly idiosyncratic thinker. (Holmes himself remarks on "the eccentricity of his mind.") The next chapter, on Carl Schmitt, begins and ends with Schmitt's most anti-Semitic and pro-Nazi writings, between which his critiques of liberalism are sandwiched. He is described as "Maistre's most original twentieth century admirer," though in fact Schmitt's infatuation with dramatic political conflict, upon which Holmes focuses, owes little to Maistre and much to the French radical Georges Sorel. The chapter on Strauss insists upon his purported agreements with Schmitt. The subsequent chapters, on MacIntyre, Lasch, and others, recall time and again that their criticisms of liberalism echo those of these earlier figures. Though in his preface Holmes claims that his purpose "is not to indulge in guilt by association," the very structure of the book, the choice of figures, and the portions of their work chosen for discussion convey precisely that message. Holmes' implicit premise is that any argument made at one time by a fascist is a fascist argument, a strategy of *reductio ad Hitlerum*. The fact that many of the same criticisms were made before and after fascism by non-fascists is underplayed. And, though Holmes promises in his introduction to distinguish antiliberalism from conservatism, he never gets around to it. The effect of these tactical choices is recaptured on the book's back cover by Holmes' colleague at the University of Chicago, Richard Posner, who tells us that the book "lays bare the structure of the nonmarxist antiliberal tradition [and] exposes its roots in the soil that nourished fascism."

HOLMES' POLEMICAL PURPOSE accounts for the least convincing element of this book: the construct of "nonmarxist antiliberalism" which he claims to anatomize. The "antiliberal" thinkers to whom Holmes devotes individual chapters turn out to have very different fundamental criticisms of liberalism, and attack it from differing angles. What they have in common, in other words, is less a shared critique of liberalism than the fact that all (to varying degrees) are critics of liberalism. But to portray them all as part of a single tradition called "antiliberalism" is much like writing a book on "the anti-Jewish tradition," with successive chapters on Greek philosophy, Christianity, Islam, communism, Nazism, and libertarianism—the coherence of the "anti"-tradition comes only from the point of view of the tradition purportedly under attack.

One can agree with Stephen Holmes that a liberal democratic regime is better than any realistic alternative and still acknowledge that some liberal democracies are more decent than others,

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and that the extent of their decency, their stability, and their ability to defend themselves may lie in elements either beyond the horizon of the liberal tradition, or beyond the typical concerns of contemporary liberalism, though not of some of the earlier thinkers regarded by Holmes as liberals. Unfortunately, Holmes' treatment of thinkers such as Locke, Montesquieu, Hume, and Smith too often recalls the observation of the late Jacob Viner: "It is the nature of historians of thought to manifest a propensity to find that their heroes had the same views as they themselves expound, for in the intellectual world this is the greatest honor they can confer upon their heroes." The result is a spirited defense of liberalism, but a premature closing of the liberal mind.

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Power play

KARINA ROLLINS

WOMEN'S FIGHT FOR equality did not end when women won the vote seventy-three years ago. Equal in theory but often not in practice, many women turned to feminism to help them fight the remainders of inequality. While these remainders were real, the feminist movement of the 1960s and beyond frequently degenerated into extremism and radical excess.

In *Fire with Fire,*[†] Naomi Wolf attempts to extract the good from the bad. While she applauds the feminist movement in general, she notes a development she believes harmful to women: the notion of women as helpless victims, unable to stand up to the "patriarchy." Women are anything but, she argues, and it is time they recognize it. Wolf announces a new feminism: power feminism, the feminism that will change the twenty-first century.

Wolf's mission is to show women that they are the real victors in the gender war. Women not only have the power to stand up to the patriarchy, Wolf argues, they have the power to eliminate it. So why does the patriarchy still exist? Too many women are not aware of their own power, a power that stems from identifying "with one another primarily through the shared pleasures and strengths of femaleness, rather than primarily through our shared vulnerability and pain."

Fire with Fire is not a man-bashing book. Wolf believes that women are no better than men, and that women, like men, have a dark side. "[I]mpulses toward aggression, retaliation, dominance, and cruelty," she writes, "are as innate to women as they are to men." Nor is Wolf always hostile to capitalism—she supports the right to make money and to become wealthy; in fact, she believes it crucial for women to do so: "every woman's work ha[s] a market value and one purpose of feminism [is] to raise every woman's market value so she [can] use her own money to determine her own life."

[†]*Random House. 373 pp. $21.00.*

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BUT IS WOLF'S FEMINISM really that different? She champions individualism as the means to women's "empowerment," yet urges women to put forth a "concerted, unified effort" to "harness the power of their [2 percent] majority" so that "the side that best represent[s] the spectrum of women's wishes [will] win." She praises individual merit and achievement, yet defines "fair" representation of women in terms of sheer numbers (e.g., her goal that Congress be 51 percent female by the year 2000).

Wolf's view of women's oppression is not complimentary to anyone (male or female) who disagrees with her. Instead of pitting men against women (as does victim feminism), her power feminism pits her "egalitarians" against others' "patriarchalists":

> The civil war of gender does not involve "men against women" on two distinct sides. The patriarchalists' worldview, shared by women as well as men, is battling the emerging egalitarian worldview, which is also shared by people of both sexes.... [I]t is just as foolish to assume that all men are opposed to women's equality as it is to assume that all women favor it.

Wolf is contemptuous of the millions of American women who do not believe that there is a systematic campaign by the "opposition" to keep them down. Wolf describes this opposition as "those men and male-dominated institutions that are actively resisting women's advancement." As for women who do not believe in the opposition—they must either not recognize their oppression or enjoy it.

Wolf goes on to provide evidence of women's oppression. For instance, there is her account of how the mainstream media discriminate against women. Wolf spends several pages listing magazines that have published more men than women, talk shows that have had more male guests than female guests, and various sectors of the media that have more men than women in high positions. Her interpretation of these numbers is often bizarre. Some of the women who appear on talk shows, she says, do not count. Morgan Fairchild does not count because she is a soap star; Iman does not count because she is a model. Wolf dismisses Phyllis Schlafly's presence as "perennial," Jeane Kirkpatrick as "trusty," and notes with disdain that Margaret Thatcher was the only woman to provide a "female perspective"—presumably unwittingly—on a show on Bosnia. Of the forty-five articles by women that *Harper's* published in 1992, nine do not qualify as independent women's journalism, Wolf explains, because they "were part of forums that conscientiously included men."

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Wolf complained about "the closed infosystem of the White Boy Rolodex" in an article last year in the *New Republic*. She wrote that women "are forced ... to speak 'for women' rather than simply hashing out the issues in a solitary way," yet her disdain for a woman who does just that belies her sincerity.

> An extreme of the female public voice is perhaps represented by a Jeane Kirkpatrick: a voice so Olympian, so neck-up and uninflected by the experience of the female body, that the subtle message received by young female writers is: to enter public voice, one must abide by the no-uterus rule.

Interestingly, the author of *The Beauty Myth* is attacking another woman for lacking femininity. Wolf's assault discredits her central claim that she believes women should be diverse, that a woman should "claim her individual voice rather than merging her voice in a collective identity." Since Kirkpatrick does not say the correct things about the correct topics, Wolf deems her a non-woman who must have learned that women "have a much better chance of being published in a big boys' magazine if they present a viewpoint disdainful of feminist reasoning."

MANY OF WOLF'S statements will find few challengers; some of what she says is so simple and obviously true ("women matter as much as men do") that one gets the impression she is trying to validate her ideology by stating already accepted truths as tenets of power feminism.

There are also a few issues that Wolf discusses cogently. For example, she presents a nuanced view of pornography, neither advocating censorship nor denying pornography's potential harm, and criticizes various forms of political correctness. Wolf distances herself from the negative extremes of the feminist movement and rightly points out that much of feminism is made to suffer for the excesses of the radicals. But the majority of her arguments are a whirlwind of assertions about the "patriarchy," the "opposition," the "backlash," "oppression," "gender apartheid," and "men's tools," as well as unsupported statements such as "most women have been sexually harassed at work."

Wolf's power feminism is not new. Her methods may be different, but her goal is the same as that of the victim feminists she criticizes: to free women from the oppression of the ruling white male patriarchy. The paranoia of her premise overwhelms the rationality of her discourse.

Inequality exists. So do discrimination and sexism. A true power feminism would urge women to stand their ground and

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fight against the *individuals* who commit these offenses. A truly new feminism would recognize an old truth: the man who does not take his female co-worker seriously because of her sex is a jerk, not a part of the systematic oppression of women by the "opposition." Any feminism obsessed with something called patriarchal oppression is not new, nor is it likely to be powerful.

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